SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 354

THE UNITED STATES OF AMERICA, APPELLANT

vs.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

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1 In District Court of the United States for the Northern District of Georgia, Atlanta Division

No. 1690—Criminal Action

UNITED STATES OF AMERICA

vs.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, ET AL.

Docket entries showing return of the indictment, filing of the demurrer to the indictment, and entry of the order sustaining the demurrer

Nov. 20, 1942—Indictment returned into open Court and filed.
Jan. 13, 1943—Filing Demurrer of all defendants, except Universal Insurance Co. and Kansas City Fire & Marine Insurance Co.
Aug. 5, 1943—Filing Order sustaining grounds 1, 2, and 5 of the demurrer to indictment and dismissing indictment.

2 In the District Court of the United States for the Northern District of Georgia, Atlanta Division

No. 16920—Criminal

UNITED STATES OF AMERICA

v.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, ET AL.

Indictment

Filed Nov. 20, 1942

UNITED STATES OF AMERICA,
Northern District of Georgia,
Atlanta Division, ss:

The Grand Jurors of the United States of America, duly impaneled, sworn, and charged, in the District Court of the United States for the Northern District of Georgia, at the October 1942 term of said Court, and inquiring within and for said District, do, upon their oaths, find and present as follows:

COUNT ONE

PERIOD OF TIME COVERED BY THIS INDICTMENT

1. Each allegation in this indictment made that an act has been performed by any of the defendants herein shall be deemed to be an allegation that such act was performed within the three years next preceding the date of the return of this indictment unless otherwise expressly stated.

THE DEFENDANTS

2. The South-Eastern Underwriters Association, an unincorporated association having its principal place of business at Atlanta, Georgia, is hereby indicted and made a defendant herein. The membership of said association is composed of stock fire insurance companies doing business in one or more of the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia. The defendant, South-Eastern Underwriters Association, will hereinafter be referred to as "SEUA."

3 3. The following-named corporations are hereby indicted and made defendants herein. Each of said corporations is a stock company engaged in the business of writing and selling fire insurance and is a member of SEUA. Said corporations will sometimes hereinafter be referred to collectively as "defendant fire insurance companies." During the period covered by this indictment, each said corporation has had, and now has, a place of business as indicated below and has been, and now is, a corporation duly organized, existing, and authorized to do business under and by virtue of the laws of the State or Country of incorporation as indicated below:

Name of corporation	Place of incorporation	Place of business
Aetna Insurance Company	Connecticut	Hartford, Connecticut.
Agricultural Insurance Company	New York	Watertown, New York.
Albany Insurance Company	New York	New York, New York.
The Allemannia Fire Insurance Company of Pittsburgh.	Pennsylvania	Pittsburgh, Pennsylvania
The Alliance Insurance Company	Pennsylvania	Philadelphia, Pennsylvania.
American Alliance Insurance Company	New York	New York, New York.
American and Foreign Insurance Company	New York	New York, New York.
American Central Insurance Company	Missouri	St. Louis, Missouri.
American Eagle Fire Insurance Company	New York	New York, New York.
American Equitable Assurance Company of New York.	New York	New York, New York.
American Fire Insurance Company	Texas	Galveston, Texas.
American Home Fire Assurance Company	New York	New York, New York.
American Indemnity Company	Texas	Galveston, Texas.
The American Insurance Company	New Jersey	Newark, New Jersey.
American Union Insurance Company of New York.	New York	New York, New York.
Anchor Insurance Company	Rhode Island	Providence, Rhode Island.
Atlantic Fire Insurance Company	North Carolina	Raleigh, North Carolina.
Atlas Assurance Company, Ltd	England	New York, New York.
The Automobile Insurance Company of Hartford, Connecticut.	Connecticut	Hartford, Connecticut.

Name of corporation	Place of incorporation	Place of business
The Baltimore American Insurance Company of New York.	New York	New York, New York.
Bankers Fire and Marine Insurance Company.	Alabama	Birmingham, Alabama.
Bankers & Shippers Insurance Company of New York.	New York	New York, New York.
Birmingham Fire Insurance Company	Alabama	Birmingham, Alabama.
Birmingham Fire Insurance Company of Pennsylvania.	Pennsylvania	Pittsburgh, Pennsylvania.
Boston Insurance Company	Massachusetts	Boston, Massachusetts.
British America Assurance Company	Canada	New York, New York.
British General Insurance Company, Ltd	England	New York, New York.
Caledonian-American Insurance Company	New York	New York, New York.
Caledonian Insurance Company	Scotland	New York, New York.
The California Insurance Company	California	San Francisco, California.
Camden Fire Insurance Association	New Jersey	Camden, New Jersey.
Capital Fire Insurance Company of California	California	Sacramento, California.
The Carolina Insurance Company	North Carolina	Wilmington, North Carolina.
Catawba Insurance Company	South Carolina	Columbia, South Carolina.
Central Insurance Company of Baltimore	Maryland	Baltimore, Maryland.
Central Union Insurance Company	New Jersey	Jersey City, New Jersey.
Century Insurance Company, Ltd	England	New York, New York.
The Charter Oak Fire Insurance Company	Connecticut	Hartford, Connecticut.
Citizens Insurance Company of New Jersey	New Jersey	Jersey City, New Jersey.
City of New York Insurance Company	New York	New York, New York.
The Columbia Fire Insurance Company	Ohio	Dayton, Ohio.
Columbia Insurance Company of New York	New York	New York, New York.
Commerce Insurance Company	New York	Glens Falls, New York.
Commercial Union Assurance Company, Ltd	England	New York, New York.
Commercial Union Fire Insurance Company of New York.	New York	New York, New York.
The Commonwealth Insurance Company of New York.	New York	New York, New York.
The Concordia Fire Insurance Company of Milwaukee.	Wisconsin	Milwaukee, Wisconsin.
The Connecticut Fire Insurance Company	Connecticut	Hartford, Connecticut.
Continental Insurance Company	New York	New York, New York.
County Fire Insurance Company	Pennsylvania	Philadelphia, Pennsylvania.
Detroit Fire and Marine Insurance Company	Michigan	Detroit, Michigan.
Dixie Fire Insurance Company	North Carolina	Greensboro, North Carolina.
The Eagle Fire Company of New York	New York	New York, New York.
Eagle Star Insurance Company, Ltd	England	New York, New York.
East & West Insurance Company of New Haven	Connecticut	New Haven, Connecticut.
Eastern Shore of Virginia Fire Insurance Company, Inc.	Virginia	Keller, Virginia.
Empire State Insurance Company	New York	Watertown, New York.
The Employers' Fire Insurance Company	Massachusetts	Boston, Massachusetts.
Equitable Fire and Marine Insurance Company.	Rhode Island	Providence, Rhode Island.
Equitable Fire Insurance Company	South Carolina	Charleston, South Carolina
Export Insurance Company	New York	New York, New York.
Federal Insurance Company	New Jersey	Jersey City, New Jersey.
Federal Union Insurance Company	Illinois	Chicago, Illinois.
Fidelity & Guaranty Fire Corporation	Maryland	Baltimore, Maryland.
Fidelity-Phoenix Fire Insurance Company	New York	New York, New York.
Fire Association of Philadelphia	Pennsylvania	Philadelphia, Pennsylvania.
Firemen's Fund Insurance Company	California	San Francisco, California.
Fireman's Insurance Company	New Jersey	Newark, New Jersey.
First American Fire Insurance Company	New York	New York, New York.
Franklin Fire Insurance Company	Pennsylvania	Philadelphia, Pennsylvania.
Franklin National Insurance Company of New York.	New York	New York, New York.
The Fulton Fire Insurance Company	New York	New York, New York.
Georgia Home Insurance Company	Georgia	Columbus, Georgia.
The Gibraltar Fire and Marine Insurance Company.	New York	New York, New York.
Girard Fire and Marine Insurance Company	Pennsylvania	Philadelphia, Pennsylvania.
Glens Falls Insurance Company	New York	Glens Falls, New York.
Globe & Republic Insurance Company of America.	Pennsylvania	Philadelphia, Pennsylvania.
Globe and Rutgers Fire Insurance Company	New York	New York, New York.
Granite State Fire Insurance Company	New Hampshire	Portsmouth, New Hampshire.
Great American Insurance Company	New York	New York, New York.

Name of corporation	Place of incorporation	Place of business
The Halifax Insurance Company	Canada	New York, New York.
Hanover Fire Insurance Company	New York	New York, New York.
Hartford Fire Insurance Company	Connecticut	Hartford, Connecticut.
Home Fire and Marine Insurance Company	California	San Francisco, California.
The Home Insurance Company	New York	New York, New York.
The Homeland Insurance Company of America.	New York	New York, New York.
6 The Homestead Fire Insurance Company.	Maryland	Baltimore, Maryland.
Imperial Assurance Company	New York	New York, New York.
Insurance Company of North America	Pennsylvania	Philadelphia, Pennsylvania.
The Insurance Company of the State of Pennsylvania.	Pennsylvania	Philadelphia, Pennsylvania.
Jersey Insurance Company of New York	New York	New York, New York.
Kansas City Fire and Marine Insurance Company.	Missouri	Kansas City, Missouri.
Knickerbocker Insurance Company of New York.	New York	New York, New York.
LaFayette Fire Insurance Company	Louisiana	New Orleans, Louisiana.
Law Union and Rock Insurance Company, Ltd.	London	New York, New York.
The Liverpool and London Globe Insurance Co., Ltd.	England	New York, New York.
The London and Lancashire Insurance Company, Ltd.	England	New York, New York.
London and Provincial Marine and General Insurance Co., Ltd.	England	New York, New York.
London & Scottish Assurance Corporation, Ltd.	Unknown	New York, New York.
The London Assurance	England	New York, New York.
Lumbermen's Insurance Company	Pennsylvania	Philadelphia, Pennsylvania.
The Manhattan Fire and Marine Insurance Company.	New York	New York, New York.
Marine Insurance Company, Limited	England	New York, New York.
Maryland Insurance Company	Delaware	New York, New York.
Massachusetts Fire and Marine Insurance Company.	Massachusetts	Boston, Massachusetts.
Mechanics and Traders Insurance Company	Connecticut	Hartford, Connecticut.
The Mercantile Insurance Company of America.	New York	New York, New York.
Merchants and Manufacturers Insurance Company of New York.	New York	New York, New York.
Mercury Insurance Company	Minnesota	St. Paul, Minnesota.
Michigan Fire and Marine Insurance Company.	Michigan	Detroit, Michigan.
Milwaukee Mechanics' Insurance Company	Wisconsin	Milwaukee, Wisconsin.
Minneapolis Fire and Marine Insurance Company.	Minnesota	Minneapolis, Minnesota.
National-Ben Franklin Fire Insurance Company.	Pennsylvania	Pittsburgh, Pennsylvania.
National Fire Insurance Company of Hartford	Connecticut	Hartford, Connecticut.
National Liberty Insurance Company of America.	New York	New York, New York.
National Security Insurance Company	Nebraska	Omaha, Nebraska.
7 National Union Fire Insurance Company.	Pennsylvania	Pittsburgh, Pennsylvania.
Netherlands Insurance Company Est. 1845	Unknown	Hartford, Connecticut.
Newark Fire Insurance Company	New Jersey	Newark, New Jersey.
The New Brunswick Fire Insurance Company	New Jersey	New Brunswick, New Jersey.
New England Fire Insurance Company	Massachusetts	Springfield, Massachusetts.
New Hampshire Fire Insurance Company	New Hampshire	Manchester, New Hampshire.
New York Fire Insurance Company	New York	New York, New York.
New York Underwriters Insurance Company	New York	New York, New York.
Niagara Fire Insurance Company	New York	New York, New York.
North British and Mercantile Insurance Company, Ltd.	England	New York, New York.
The North Carolina Home Insurance Company	North Carolina	Raleigh, North Carolina.
The Northern Assurance Company, Limited	England	New York, New York.
Northern Insurance Company of New York	New York	New York, New York.
The North River Insurance Company	New York	New York, New York.
Northwestern Fire and Marine Insurance Company.	Minnesota	Minneapolis, Minnesota.
Northwestern National Insurance Company	Wisconsin	Milwaukee, Wisconsin.
Norwich Union Fire Insurance Society, Ltd	England	New York, New York.
Occidental Insurance Company	California	San Francisco, California.
Old Colony Insurance Company	Massachusetts	Boston, Massachusetts.
Old Dominion Fire Insurance Company	Virginia	Roanoke, Virginia.

Name of corporation	Place of incorporation	Place of business
Orient Insurance Company	Connecticut	Hartford, Connecticut.
The Pacific Coast Fire Insurance Company	Canada	New York, New York.
Pacific Fire Insurance Company	New York	New York, New York.
Pacific National Fire Insurance Company	California	San Francisco, California.
Palatine Insurance Company, Ltd	England	New York, New York.
Paramount Fire Insurance Company	New York	New York, New York.
Patriotic Insurance Company	New York	New York, New York.
The Paul Revere Fire Insurance Company	New York	Buffalo, New York.
The Pennsylvania Fire Insurance Company	Pennsylvania	Philadelphia, Pennsylvania.
Philadelphia Fire and Marine Insurance Company.	Pennsylvania	Philadelphia, Pennsylvania.
Philadelphia National Insurance Company	Pennsylvania	Philadelphia, Pennsylvania.
Phoenix Assurance Company, Limited, of London.	England	New York, New York.
8 Phoenix Insurance Company	Connecticut	Hartford, Connecticut.
Piedmont Fire Insurance Company	North Carolina	Charlotte, North Carolina.
The Potomac Insurance Company of the District of Columbia.	District of Columbia	Washington, D. C.
Providence Washington Insurance Company	Rhode Island	Providence, Rhode Island.
Providence Fire Insurance Company	New Hampshire	New York, New York.
Queen Insurance Company of America	New York	New York, New York.
The Reliance Insurance Company of Philadelphia.	Pennsylvania	Philadelphia, Pennsylvania.
Rhode Island Insurance Company	Rhode Island	Providence, Rhode Island.
Richmond Insurance Company of New York	New York	Brighton, New York.
Rochester American Insurance Company	New York	New York, New York.
The Royal Exchange Assurance	England	New York, New York.
Royal Insurance Company, Limited	England	New York, New York.
Safeguard Insurance Company	New York	New York, New York.
St. Paul Fire and Marine Insurance Company	Minnesota	St. Paul, Minnesota.
Scottish Union and National Insurance Company.	Unknown	Hartford, Connecticut.
Seaboard Fire and Marine Insurance Company of New York, N. Y.	New York	New York, New York.
Seaboard Insurance Company	Maryland	Baltimore, Maryland.
The Sea Insurance Company, Limited	England	New York, New York.
Security Insurance Company of New Haven	Connecticut	New Haven, Connecticut.
Sentinal Fire Insurance Company	Massachusetts	Springfield, Massachusetts.
South Carolina Insurance Company	South Carolina	Columbia, South Carolina.
Southeastern Fire Insurance Company	South Carolina	Greenville, South Carolina.
Southern Fire and Marine Insurance Company of Georgia.	Georgia	Atlanta, Georgia.
Southern Fire Insurance Company	North Carolina	Durham, North Carolina
Springfield Fire and Marine Insurance Company.	Massachusetts	Springfield, Massachusetts.
The Standard Fire Insurance Company	Connecticut	Hartford, Connecticut.
The Standard Fire Insurance Company of New Jersey	New Jersey	Trenton, New Jersey.
Standard Insurance Company of New York	New York	New York, New York.
Standard Marine Insurance Company, Limited	England	New York, New York.
Star Insurance Company of America	New York	New York, New York.
The State Assurance Company, Limited	England	New York, New York.
Stonewall Insurance Company	Alabama	Mobile, Alabama.
Sun Insurance Office, Ltd	England	New York, New York.
Sun Underwriters Insurance Company	New York	New York, New York.
Transcontinental Insurance Company	New York	New York, New York.
The Travelers Fire Insurance Company	Connecticut	Hartford, Connecticut.
Twin City Fire Insurance Company	Minnesota	Minneapolis, Minnesota.
Union Assurance Society, Limited	England	New York, New York.
Union Insurance Society of Canton, Limited	Hong Kong	New York, New York.
The Union Marine & General Insurance Company, Limited.	England	New York, New York.
United Firemen's Insurance Company of Philadelphia.	Pennsylvania	Philadelphia, Pennsylvania.
United States Fire Insurance Company	New York	New York, New York.
Universal Insurance Company	New Jersey	Jersey City, New Jersey.
Vigilant Insurance Company	New York	New York, New York.
Virginia Fire and Marine Insurance Company	Virginia	Richmond, Virginia.
Westchester Fire Insurance Company	New York	New York, New York.
Western Assurance Company	Canada	New York, New York.
Western Fire Insurance Company	Kansas	Fort Scott, Kansas.
The World Fire and Marine Insurance Company.	Connecticut	Hartford, Connecticut.
Yorkshire Insurance Company, Limited	England	New York, New York.

4. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of the said individuals now is associated with or employed by SEUA and holds an official title or position as shown below, or has been so associated or employed, or has so held an official title or position during the period covered by this indictment and within three years prior to the date of the presentment thereof. Said individual defendants, during the period covered by this indictment, and within three years immediately preceding the date of its presentment, have been actively engaged in the management, direction, and control of the affairs, policies, and acts of the defendant SEUA, and particularly those affairs, policies, and acts of said defendant SEUA described in this indictment, and have authorized, ordered, or done some or all of such acts:

10

Name	Address	Title or position with SEUA
Louis P. Jervey	Atlanta, Georgia	President.
Ashby E. Hill	New York, New York	Vice President.
Lloyd T. Wheeler	Atlanta, Georgia	Manager-Secretary.
Paul B. Hulfish	Atlanta, Georgia	Assistant Secretary.
R. M. Anderson	West Hartford, Connecticut	Executive Committeeman.
E. B. Barnett	Atlanta, Georgia	Executive Committeeman.
Dowdell Brown	Atlanta, Georgia	Executive Committeeman.
Esmond Ewing	West Hartford, Connecticut	Executive Committeeman.
M. H. Grannatt	Ridgewood, New Jersey	Executive Committeeman.
P. H. Hines	Atlanta, Georgia	Executive Committeeman.
Charles M. Jervey	Atlanta, Georgia	Executive Committeeman.
Donald R. Martin	Montclair, New Jersey	Executive Committeeman.
R. W. Michael	Atlanta, Georgia	Executive Committeeman.
E. N. O'Beirne	Atlanta, Georgia	Executive Committeeman.
A. R. Phillips	Montclair, New Jersey	Executive Committeeman.
Langdon C. Quin	Atlanta, Georgia	Executive Committeeman.
Thomas J. Southerland	New York, New York	Executive Committeeman.
A. H. Turner	Atlanta, Georgia	Executive Committeeman.
B. C. Vitt	Maplewood, New Jersey	Executive Committeeman.
J. M. Waller	Hartford, Connecticut	Executive Committeeman.
Henry P. Whitman	Hartford, Connecticut	Executive Committeeman.
Caspar S. Whitner	Atlanta, Georgia	Executive Committeeman.

5. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of the said individuals now is associated with or employed by the inspection and rating bureau set opposite his name and holds the official title or position of manager thereof, or has so held such official title or position during the period covered by this indictment and within three years prior to the date of the presentment thereof. Each of said individual defendants, during the period covered by this indictment and within three years immediately preceding the date of its presentment, has been actively engaged in the management, direction, and control of the affairs, policies, and acts of the inspection and rating bureau set opposite his name, and particularly those affairs, policies, and acts of said inspection

and rating bureau described in this indictment, and has authorized, ordered, or done some or all of such acts:

Name	Address	Inspection and rating bureau
L. P. Goodwin	Montgomery, Alabama	Alabama Inspection and Rating Bureau.
R. P. Goodloe	Jacksonville, Florida	Florida Inspection and Rating Bureau.
E. H. Dunnington	Atlanta, Georgia	Georgia Inspection and Rating Bureau.
Landon Hill	Raleigh, North Carolina	North Carolina Inspection and Rating Bureau.
James R. Parker	Columbia, South Carolina	South Carolina Inspection and Rating Bureau.

11 6. Wherever it is herein alleged that a defendant corporation, association, or inspection and rating bureau did any act or thing, such allegation shall be deemed to mean that the officers, directors, executive committeemen, agents, or employees of the respective corporations, association, or inspection and rating bureaus, including those officers, directors, executive committeemen, agents, and employees named as defendants herein, authorized, ordered, or did such act or thing for and on behalf of their particular corporation, association, or inspection and rating bureau while actively engaged in the management, direction, or control of its affairs.

DEFINITIONS

7. As used herein, the term "general agent" shall be deemed to mean a representative of a fire insurance company who receives and passes upon daily reports of all agents in the territory under his jurisdiction, and has, in other respects, supervision of such agents. The territory of a general agent may consist of part of a State, a State, or several States. A general agent sometimes represents several fire insurance companies.

8. As used herein, the term "special agent" or "field man" shall be deemed to mean a traveling employee or representative of a fire insurance company or of a general agent thereof, having jurisdiction over a certain designated territory and charged with the duties of establishing local agencies, assisting and supervising such agencies, and, in some cases, adjusting losses.

9. As used herein, the term "local agent" shall be deemed to mean a representative of a fire insurance company in a designated locality or territory, empowered to bind his principal on risks of fire insurance and to issue, endorse, or cancel policies and to collect premiums and pay return premiums as occasion demands. He is not authorized to adjust losses except by special arrangement. He is usually compensated on a commission basis and may represent more than one company.

10. As used herein, the term "reinsurance" shall be deemed to mean a contract whereby one or more fire insurance com-
12 panies agree to indemnify another, either in whole or in part, against loss or liability, the risk of which the latter has assumed under a separate and distinct contract as insurer of a third party.

11. As used herein, the term "fire insurance" shall be deemed to mean a commodity sold by contract, usually termed a "policy," between a fire insurance company or "carrier," and one or more persons or "policyholders," whereby the fire insurance company, for a fixed consideration usually paid in advance and customarily called a premium, agrees to indemnify the policyholder or policyholders, in whole or in part, up to a specified amount, for loss or damage to designated property by fire or by other specified hazards. It includes so-called "allied lines" such as inland navigation and transportation, inland marine, sprinkler leakage, explosion, windstorm and tornado, extended coverage, use and occupancy, and riot and civil commotion insurance.

12. As used herein, the term "inspection and rating bureau" shall be deemed to mean an office or subordinate branch of SEUA operating in a designated territory and performing, under the direction and control of SEUA, certain functions relating to the business of fire insurance, including the inspection of risks and the examination of daily reports submitted by agents of defendant fire insurance companies, for the purpose of enforcing conformity to the rates, forms, rules, and regulations prescribed by SEUA.

NATURE OF TRADE AND COMMERCE INVOLVED

13. There are several types of fire insurance companies, including stock, mutual, Lloyds, and reciprocal companies. Stock companies receive approximately 85% of the total premium income of all fire insurance companies operating in the United States. During the year 1941 the premium received by all stock fire insurance companies for the sale of fire insurance in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, exclusive of cancellations and reinsurance ceded, amounted to more than $52,000,000.00. For the ten-year period 1931–1940, inclusive, such premiums amounted to more
13 than $436,000,000.00. Losses paid by such companies during the year 1941 in the said States amounted to approximately $18,000,000.00; and for the ten-year period 1931–1940, inclusive, to approximately $197,000,000.00. During the year 1941 and the ten-year period 1931–1940, inclusive, defendant fire insurance companies, members of SEUA, received approximately 90% of the total premium income, exclusive of cancella-

tions and reinsurance ceded, derived by all stock fire insurance companies from the sale of fire insurance in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia.

14. The properties insured by the defendant fire insurance companies include, among others, dwelling houses and their contents, wholesale and retail stores and their contents, farm houses and their appurtenances, office buildings, factories, distilleries, refineries, public buildings, blast furnaces, rail mills, airplane hangars, auto garages, steamboats, tugs and ferries, hotels, shipyards, warehouses and terminals, trucks and busses, railroad equipment and rolling stock, and goods, wares, and merchandise of all types carried in transit in interstate and foreign commerce by motor vehicles, railroads, airplanes, and other media of transportation.

15. Fire insurance coverage is essential to and directly affects the flow of interstate commerce. Goods, wares, and merchandise of all kinds, to the value of billions of dollars, are constantly moving in the current of interstate commerce. They are subjected to risk of damage or destruction by the elements or from human negligence or intent. Fire insurance affords necessary protection against these risks to shippers, consignees, warehousemen, and common carriers.

16. A fire insurance company operates by appointing agents and making arrangements to do business through brokers or by soliciting property owners. Companies that operate through local agents require and receive written reports from said agents with respect to policies written, and accept and continue the business or order it canceled as they deem fit.

14. 17. Instead of exercising supervision over local agents from a company office, many defendant fire insurance companies appoint general agents, who operate on a commission basis and are themselves subject to the supervision of the appointing company. Each of the defendant fire insurance companies maintains one or more general agents or branch managers in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia.

18. Local agents are supervised by fire insurance company field men and by employees and officers of the appointing company or by general agents thereof. Company officers and general agents maintain communications with local agents by mail, telegraph, and telephone. The local agent solicits prospects; accepts or rejects offers of fire insurance; issues policies in numerical order on forms supplied by the company and transmitted to him from the home office of the company by mail or express; and mails daily reports to the company, in due course collecting the premi-

ums due. If a loss occurs, the local agent receives notice from the policyholder and reports the loss to the company. In some instances when the loss is small the company will request the local agent to adjust it. In most cases it will send an adjuster. When the loss has been adjusted, the company mails the local agent a check or draft for delivery to the policyholder. In the course of business the company may also order the local agent to cancel a policy. Each month the local agent prepares an account covering premiums on policies issued and additional and return premiums on policies endorsed or canceled. This account includes a statement of commissions due the local agent and return commissions due the company. It is forwarded to the company, and the local agent is expected to pay the balance due within a stipulated time.

19. Some of the defendant fire insurance companies organized to conduct nation-wide business maintain in their principal offices territorial departments for handling Eastern, Western, Southern, and Pacific Coast business. Ninety-three of the defendant fire insurance companies maintain their home offices or United States branches in the State of New York; eighteen in the State of Pennsylvania; sixteen in the State of Connecticut; ten in the State of New Jersey; seven in the State of Massachusetts; six in each of the States of California and North Carolina; five in the State of Minnesota; four in each of the States of Maryland, Rhode Island, and South Carolina; three in each of the States of Alabama, Virginia, and Wisconsin; two in each of the States of Georgia, Michigan, Missouri, New Hampshire, and Texas; and one in each of the States of Illinois, Kansas, Louisiana, Nebraska, and Ohio, and the District of Columbia. Many of the defendant fire insurance companies do business in numerous other States of the United States.

20. The States of Alabama, Florida, Georgia (including the Northern District thereof), North Carolina, South Carolina, and Virginia compose the territory of SEUA. SEUA maintains inspection and rating bureaus in the States of Alabama, Florida, Georgia, North Carolina, and South Carolina. Each bureau is under the supervision of a manager and is financially supported by SEUA. Two inspection and rating bureau offices are maintained in Alabama, four in Florida, two in Georgia, and one in each of the States of North Carolina and South Carolina.

THE CONSPIRACY

21. Beginning sometime prior to the year 1937, the exact date being to the Grand Jurors unknown, and continuing up to the date of the presentment of this indictment, the defendants, and others to the Grand Jurors unknown, have engaged knowingly and continuously in a conspiracy to fix and maintain arbitrary

and noncompetitive premium rates on fire insurance sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, which conspiracy has been in restraint of the interstate trade and commerce described in this indictment in violation of section 1 of the Act of Congress of July 2, 1890, as amended (U. S. C., Title 15, Sec. 1), commonly known as the Sherman Act.

22. The aforesaid conspiracy has consisted in a continuing agreement and concert of action, the substantial terms of which have been that the defendants:

(a) Agree to sell, and have sold, fire insurance, at premium rates or prices established and determined by SEUA;

16. (b) Agree to pay, and have paid, commissions to their agents for the sale of fire insurance at rates established and fixed by SEUA;

(c) Agree to adopt, and have adopted, reclassifications of types of fire insurance risks and agree to establish and maintain, and have established and maintained, premium rates or prices for fire insurance on the basis of such reclassifications of risks;

(d) Agree to utilize and adhere to, and have utilized and adhered to, standard terms, conditions, and clauses relating to coverage of various types of risks established by SEUA for use in, and in connection with, fire insurance policies;

(e) Agree to withhold reinsurance facilities from, and to prevent access to, such facilities by fire insurance companies which are not members of SEUA, and have withheld and prevented access to such facilities by fire insurance companies which are not members of SEUA;

(f) Threaten to withdraw from any agency which undertakes to represent companies which are not members of SEUA and refuse to enter agencies which represent fire insurance companies which are not members of SEUA, and have actually withdrawn from agencies representing companies not members of SEUA and have refused to enter agencies representing fire insurance companies which are not members of SEUA;

(g) Threaten to boycott and withhold patronage from persons purchasing fire insurance from companies which are not members of SEUA;

(h) Agree to disparage, and have disparaged, the services and facilities of fire insurance companies which are not members of SEUA;

(i) Agree to establish and maintain, and have established and maintained, inspection and rating bureaus in the

17 States of Alabama, Florida, Georgia, North Carolina, and South Carolina to police, strengthen, and further the agreements and practices set forth herein, and have policed, strengthened, and furthered such agreements and practices through the medium of said inspection and rating bureaus;

(j) Agree to establish and maintain, and have established and maintained, local boards and groups of fire insurance agents in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, and in certain cities of said States, to police, strengthen, and further the agreements and practices alleged herein.

23. During the period of time covered by this indictment, and for the purpose of forming and effectuating the aforesaid conspiracy, the defendants by agreement and concerted action have done the things which, as hereinbefore alleged, they conspired to do, and have done all the acts and things necessary to carry out the aforesaid conspiracy.

EFFECT OF THE CONSPIRACY

24. The aforesaid agreement and concerted action of the defendants, pursuant to and in furtherance of the conspiracy alleged in this indictment, have had the effect, as intended by the defendants, of unlawfully suppressing competition in the sale of fire insurance, of preventing the determination by free and competitive practices of premium rates on fire insurance sold by defendants, of arbitrarily controlling and fixing noncompetitive premium rates on fire insurance, in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, and have had the effect thereby of restraining the interstate trade and commerce described in this indictment, in violation of section 1 of the Sherman Act.

JURISDICTION AND VENUE

25. During the period of time covered by this indictment, and within three years of the date of the presentment thereof,
18 the unlawful conspiracy hereinbefore alleged has been carried out in part within the Northern District of Georgia and within the jurisdiction of this Court. Meetings of the defendant SEUA and of its Executive Committee, at which premium rates of fire insurance and rates of commission have been discussed and agreed upon and standard terms, conditions, and clauses of fire insurance policies discussed and adopted, have been held within said District during said period of time. Letters and reports have been issued and received by the defendant SEUA and by certain of defendant companies maintaining offices in said District, for the purpose of effectuating the said unlawful conspiracy, and other acts pursuant to and in execution of the said unlawful conspiracy have been done and committed within said District during said period of time.

26. And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do further present and find that the

defendants named herein, throughout the period of time covered by this indictment and within the three years next preceding the presentment thereof, have engaged in an unlawful conspiracy to restrain, obstruct, and burden interstate trade and commerce in fire insurance, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

COUNT TWO

27. And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege, and incorporate, as if herein set forth in full, each of the allegations set forth in Paragraphs 1 to 20, inclusive, of Count One of this indictment.

THE CONSPIRACY

28. Beginning sometime prior to the year 1937, the exact date being to the Grand Jurors unknown, and continuing up to the date of the presentment of this indictment, the defendants, and others to the Grand Jurors unknown, have engaged knowingly and continuously in a conspiracy to monopolize trade and
19 commerce in fire insurance in and among the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia in violation of section 2 of the Act of Congress of July 2, 1890, as amended (U. S. C., Title 15, Sec. 2), commonly known as the Sherman Act.

29. The aforesaid conspiracy has consisted in a continuing agreement and concert of action, the substantial terms of which have been that the defendants:

(a) Agree to sell, and have sold, fire insurance at premium rates or prices established and determined by SEUA;

(b) Agree to pay, and have paid, commissions to their agents for the sale of fire insurance at rates established and fixed by SEUA;

(c) Agree to adopt, and have adopted, reclassifications of types of fire insurance risks and agree to establish and maintain, and have established and maintained, premium rates or prices for fire insurance on the basis of such reclassifications of risks;

(d) Agree to utilize and adhere to, and have utilized and adhered to, standard terms, conditions, and clauses relating to coverage of various types of risks established by SEUA for use in and in connection with fire insurance policies;

(e) Agree to withhold reinsurance facilities from and to prevent access to such facilities by fire insurance companies which are not members of SEUA, and have withheld and prevented access to such facilities by fire insurance companies which are not members of SEUA;

(f) Threaten to withdraw from any agency which undertakes to represent companies which are not members of SEUA and refuse to enter agencies which represent fire insurance companies which are not members of SEUA, and have actually withdrawn from agencies representing companies not members of SEUA and have refused to enter agencies representing fire insurance companies which are not members of SEUA;

(g) Threaten to boycott and withhold patronage from persons purchasing fire insurance from companies which are not members of SEUA;

(h) Agree to disparage, and have disparaged, the services and facilities of fire insurance companies which are not members of SEUA;

(i) Agree to establish and maintain, and have established and maintained, inspection and rating bureaus in the States of Alabama, Florida, Georgia, North Carolina, and South Carolina to police, strengthen and further the agreements and practices set forth herein and have policed, strengthened, and furthered such agreements and practices through the medium of said inspection and rating bureaus;

(j) Agree to establish and maintain, and have established and maintained, local boards and groups of fire insurance agents in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, and in certain cities of said States, to police, strengthen, and further the agreements and practices alleged herein.

30. During the period of time covered by this indictment and for the purpose of forming and effectuating the aforesaid conspiracy, the defendants by agreement and concerted action have done the things which, as hereinbefore alleged, they conspired to do, and have done all the acts and things necessary to carry out the aforesaid conspiracy.

EFFECT OF THE CONSPIRACY

31. The aforesaid agreement and concerted action of the defendants, pursuant to the conspiracy alleged in this Count, have, as intended by the defendants, been in furtherance of monopolization of the trade and commerce in fire insurance in and among the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, and have tended to exclude, and have excluded, divers persons, firms, and corporations, other than the defendants herein, engaged in or who would have engaged in the sale in interstate commerce of fire insurance in and among the said States from that part of said trade and commerce which, but for the aforesaid agreement and concerted action of the defendants as aforesaid, would have been secured, as a matter of lawful right, by said divers persons, firms, and corporations.

JURISDICTION AND VENUE

32. During the period of time covered by this indictment, and within three years of the date of the presentment thereof, the unlawful conspiracy to monopolize hereinbefore alleged has been carried out in part within the Northern District of Georgia and within the jurisdiction of this Court. Meetings of the defendant SEUA and of its Executive Committee, at which premium rates of fire insurance and rates of commission have been discussed and agreed upon and standard terms, conditions, and clauses of fire insurance policies discussed and adopted, have been held within the said District during said period of time. Letters and reports have been issued and received by the defendant SEUA and certain of defendant companies maintaining offices in the said District, for the purpose of effectuating the said unlawful conspiracy to monopolize, and other acts pursuant to and in execution of the said unlawful conspiracy to monopolize have been done and committed within said District during said period of time.

33. And so the Grand Jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do further present and find that the defendants named herein, throughout the period of time covered by this indictment and within the three years next preceding the presentment thereof, have engaged in an unlawful conspiracy to monopolize interstate trade and commerce in fire insurance, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Dated, Atlanta, Georgia, November 20, 1942.

A True Bill:

T. B. HAZLERIGS,
Foreman of the Grand Jury.

22

FRANK H. ELMORE, Jr.,
Special Assistant to the Attorney General.

MANUEL M. GORMAN,
Special Attorney.

H. DONALD LEATHERWOOD,
Special Attorney.

THURMAN ARNOLD,
Assistant Attorney General.

J. ELLIS MUNDY,
United States Attorney.

Filed in Open Court Nov. 20, 1942.
F. L. BEERS, *Clerk.*
By B. G. NASH, *Deputy.*

23 In United States District Court

[Title omitted.]

Demurrer

Filed Jan. 13, 1943

All defendants, except Universal Insurance Company and Kansas City Fire and Marine Insurance Company, by their attorneys, demur to the indictment herein, and separately to Count One and Count Two thereof, upon the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States nor does either Count thereof.

2. The business of fire insurance is not commerce, and the Supreme Court of the United States has repeatedly so held.

3. The indictment is based upon an interpretation and application of Sections 1 and 2 of the Sherman Act which would invade the rights reserved to the States by the Tenth Amendment to the Constitution of the United States.

4. The indictment is based upon an interpretation and application of Sections 1 and 2 of the Sherman Act which would be repugnant to the Fifth and Sixth Amendments to the Constitution of the United States by giving to those Sections a meaning so broad, unlimited, vague, uncertain, and indefinite as not to inform the moving defendants of the nature and cause of the accusation against them and to deprive the moving defendants of liberty and property without due process of law.

5. This Court is without jurisdiction of the subject matter of the indictment.

Wherefore these defendants pray that the indictment and both Counts thereof be dismissed.

Yours, etc.,

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
MACDOUGALD, TROUTMAN & ARKWRIGHT,
Attorneys for all Defendants, except Universal Insurance Company and Kansas City Fire and Marine Insurance Company.

24 To FRANK H. ELMORE, Jr., Esq.,
Special Assistant to the Attorney General.
J. ELLIS MUNDY, Esq.,
United States Attorney.

JAN. 13, 1943.

Service on the foregoing Demurrer on behalf of the United States Attorney for the Northern District of Georgia is hereby, acknowledged and all further service waived.

PIERRE HOWARD,
Asst. U. S. Attorney.

[File endorsement omitted.]

25 In United States District Court

[Title omitted.]

Opinion on demurrer

Filed Aug. 5, 1943

On November 20, 1942, an indictment was returned by a Grand Jury of this Court against one hundred and ninety-eight corporations and twenty-seven individuals, charging such corporations and individuals with a conspiracy to fix and maintain arbitrary and noncompetitive rates on fire insurance sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, in violation of Section 1 of the Sherman Anti-Trust Act, 26 Stat. 209, and with a conspiracy to monopolize trade and commerce in fire insurance in said States in violation of Section 2 of the Act.

On January 13, 1943, defendants filed a demurrer challenging the sufficiency of the indictment upon the grounds that it charges no offense against the United States; that the business of fire insurance is not commerce; that the interpretation of the Act insisted upon would be a violation of the Tenth, Fifth, and Sixth Amendments to the Constitution; and that the Court is without jurisdiction of the subject matter of the indictment.

The case came on regularly to be heard on the demurrer and was argued orally and subsequently by briefs.

To constitute a violation of the Sherman Act, the restraint and monopoly denounced must be that of interstate trade or commerce, and unless the restraint and monopoly charged in the indictment be restraint or monopoly of interstate trade or commerce, the indictment must fall.

It is not a question here of whether the defendants participated in some incidental way in interstate commerce or used in some instances the facilities of interstate commerce but is rather

whether the activities complained of as constituting the business of insurance would themselves constitute interstate trade or commerce, and whether defendant's method of conducting same amounted to restraint or monopoly of same. It is not a
26 question as to whether or not Congress had power to regulate the insurance companies or some phases of their activities, but rather whether Congress did do so by the Sherman Act.

Persons may be engaged in interstate commerce, yet, if the restraint or monopoly complained of is not itself a restraint or monopoly or interstate trade or commerce, they may not be convicted of violation of the Sherman Act. The fact that they may use the mails and instrumentalities of interstate commerce and communication, and be subject to Federal regulations relating thereto, would not make applicable the Sherman Act to intrastate commerce or to activities which were not commerce at all.

The whole case, therefore, depends upon the question as to whether or not the business of insurance is interstate trade or commerce, and if so, whether the transactions alleged in the indictment constitute interstate commerce.

The Supreme Court has repeatedly held, during a period of seventy-five years, that the business of insurance is not commerce, either intrastate or interstate. They have done so unequivocally and unambiguously.

Paul vs. Virginia, 8 Wall. 168.

Hooper vs. California, 155 U. S. 648.

Noble vs. Mitchell, 164 U. S. 367.

New York Life Insurance Co. vs. Cravens, 178 U. S. 389.

New York Life Insurance Co. vs. Deer Lodge County, 231 U. S. 495.

Bothwell vs. Buckbee, Mears Co., 275 U. S. 274.

Western Live Stock vs. Bureau of Revenue, 303 U. S. 250, 253.

This is not denied by the Government, but it maintains that in some of the cases the ruling was obiter and in others based upon a misconception and failure to comprehend the sweeping scope of the fire insurance business. (Government's Brief, pages 8 & 9.) Neither of these positions is sound. In all of the
27 above-cited cases, the ruling was essential to the case and the reasoning of the Court showed most careful analysis and full consideration of the questions now raised and did not merely follow "without reconsideration or reason, the fallacy established in the dictum of Paul vs. Virginia." (Government's Brief, page 15.)

This is especially true in the elaborately argued and thoroughly considered case of New York Life Insurance Co. vs. Deer Lodge County, supra.

The Court could not be clearer in its announcement that in the expressions, "The business of insurance is not commerce. The

contract of insurance is not an instrumentality of commerce" (Hooper vs. California, 155 U. S. 648, 655); and "Contracts of insurance are not commerce at all, neither state nor interstate" (New York Life Insurance Co. vs. Deer Lodge County, 231 U. S. 495, 510).

The same reasoning applies to the word "trade" as used in Sections 1 and 2 of the Sherman Act. It has a different significance in Section 3, but this fact does not enlarge its meaning in Sections 1 and 2. "Section 1 having been passed under the specific power to regulate commerce, its meaning necessarily must be limited by the scope of that power; and it may be that the words 'trade' and 'commerce' are there to be regarded as synonymous. On the other hand, § 3, so far as it relates exclusively to the District of Columbia, could not have been passed under the power to regulate interstate or foreign commerce, since that provision of the section deals not with such commerce but with restraint of trade purely local in character" (Atlantic Cleaners & Dyers vs. United States, 286 U. S. 427, 434).

This difference in the meaning of the word "trade" as used in the different sections of the Act is referred to and emphasized in the later cases of Associated Press vs. Labor Board, 301, U. S. 103; Apex Hosiery Company vs. Leader, 310 U. S. 469, and American Medical Association vs. United States, 317 U. S. 519.

Under the extremely broad construction of the words
28 "interstate commerce" by the Supreme Court, which has been so ably presented by counsel for the Government, it is difficult to conceive how the business of insurance could be interstate trade and yet not be interstate commerce. At any rate, the finding by the Supreme Court that the business of insurance is not commerce seems to me to demand a finding that the business of insurance is not "interstate trade" and is not covered by the Sherman Act

In the case of Apex Hosiery Co. vs. Leader, 310 U. S. 469, on page 495, the Court say:

"The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, Atlantic Cleaners & Dyers vs. U. S., 286 U. S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected intertsate commerce."

The business of insurance is not interstate commerce or interstate trade, though it might be considered a trade subject to local laws, either State or Federal, where the commerce clause is not the authority relied upon. But where the exercise of power is

under the commerce clause alone, as in cases under the Sherman Act, the "trade" must have reference to transactions in or which affect interstate commerce.

"This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for constitutional reasons, are confined to transactions in, or which affect, interstate commerce". (Apex Hosiery Co. vs. Leader, 310 U. S. 469, 498).

29 Here the "trade" pursued, if it be such, is that of conducting the business of insurance, which the Supreme Court has held to be local and not interstate in character.

Counsel for the Government concede that in the numerous decisions cited the Supreme Court has held that the business of insurance is not commerce, yet, strangely enough, ask this Court to rule directly to the contrary. Of course, the Supreme Court decisions must be followed by this Court. The indictment does not disclose any facts or differences in this case which would remove it from the controlling effect of the decisions of the Supreme Court holding that the business of insurance is not commerce.

If there is to be any overruling of the long line of clear and thoroughly considered decisions of the Supreme Court, acquiesced in for seventy-five years by Congress and administrative agencies, it will have to be done by the Supreme Court itself or by Congress.

The conspiracies charged in the indictment are not conspiracies in restraint of or to monopolize interstate trade or commerce. The indictment, therefore, does not charge Federal offenses and should be dismissed.

An order will be passed to accompany this section, sustaining the demurrer on Grounds 1, 2, and 5 thereof, and dismissing the indictment.

This 5th day of August 1943.

E. MARVIN UNDERWOOD,
United States District Judge.

[File endorsement omitted.]

30 In United States District Court

[Title omitted.]

Order dismissing indictment

Filed August 5, 1943

The demurrer in the above case came on to be heard and was argued orally and subsequently by briefs.

After hearing, and upon consideration thereof, Grounds 1, 2, and 5 of the demurrer are sustained, and the indictment is hereby dismissed.

This 5th day of August 1943.

E. MARVIN UNDERWOOD,
United States District Judge.

31 In United States District Court

[Title omitted.]

Petition for appeal

Filed Aug. 30, 1943

The United States of America, plaintiff in the above-entitled case, considering itself aggrieved by the order of this Court entered on the 5th day of August 1943, sustaining a demurrer to the indictment in this cause, does hereby pray an appeal from said order to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said order was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

This 30th day of August 1943.

M. NEIL ANDREWS,
United States Attorney.

FRANK H. ELMORE, Jr.,
Special Assistant to the Attorney General.

32 In United States District Court

[Title omitted.]

Order allowing appeal

Filed Aug. 30, 1943

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal

to the Supreme Court of the United States from the order of this Court entered on the 5th day of August 1943, sustaining a demurrer to the indictment in this cause, and having also made and filed its assignment of errors and prayer for reversal and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided:

It is therefore ordered and adjudged that the appeal be, and the same is hereby, allowed as prayed for.

This 30th day of Aug. 1943.

E. MARVIN UNDERWOOD,
District Judge.

33 In United States District Court

[Title omitted.]

Assignment of errors

Filed Aug. 30, 1943

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for an appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and to the entry of the order sustaining a demurrer to the indictment by the said District Court on August 5, 1943, in the above-entitled cause, and says that in the entry of said order the said District Court committed material error, to the prejudice of the said plaintiff in the following particulars:

1. The court erred in sustaining the defendants' demurrer to the indictment.

2. The court erred in entering an order sustaining the demurrer to the indictment upon the ground that the business of fire insurance is not commerce.

3. The court erred in holding that the business of fire insurance does not constitute "trade or commerce" within the meaning of Section 1 or Section 2 of the Act of July 2, 1890, 15 U. S. C., secs. 1 and 2, commonly known as the Sherman Act.

4. The court erred in holding that the conspiracy charged in count one of the indictment was not a conspiracy in restraint of "trade or commerce" prohibited by Section 1 of the Sherman Act.

5. The court erred in holding that the conspiracy charged in count two of the indictment was not a conspiracy to monopolize "trade or commerce" prohibited by Section 2 of the Sherman Act.

Wherefore the United States of America respectfully prays that the order of the District Court sustaining a demurrer to the

indictment may be reversed, and for such other and fit relief as to the Court may seem just and proper.

This 30th day of August 1943.

M. NEIL ANDREWS,
United States Attorney.

FRANK H. ELMORE, JR.,
Special Assistant to the Attorney General.

34 [Citation in usual form, filed Aug. 30, 1943; omitted in printing.]

39 In United States District Court

[Title omitted.]

Praecipe for record

Filed Aug. 30, 1943

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript, in the order given below, the following papers, viz:

1. Docket entries showing return of the indictment, filing of the demurrer to the indictment, and entry of the order sustaining the demurrer.
2. The indictment.
3. Defendant's demurrer to the indictment.
4. Opinion of the district court.
5. Order and judgment sustaining defendants' demurrer to the indictment.
6. Petition for appeal.
7. Order allowing appeal.
8. Assignment of errors.
9. Statement required by Rule 12, paragraph 2.
10. Citation.
11. Proof of service.
12. Statement as to jurisdiction.
13. This praecipe.

This 30th day of August 1943.

M. NEIL ANDREWS,
United States Attorney.

FRANK H. ELMORE, JR.,
Special Assistant to the Attorney General.

40 [Clerk's certificate to foregoing transcript omitted in printing.]

41 In the Supreme Court of the United States

Statement of points to be relied upon and designation of parts of the record necessary for consideration thereof

Filed Sept. 23, 1943

1. Now comes the appellant in the above-entitled cause, and for its statement of the points upon which it intends to rely in its appeal to this Court adopts the points contained in its assignment of errors heretofore filed herein.

2. The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

CHARLES FAHY,
Charles Fahy,
Solicitor General.

Dated this 15th day of September 1943.

Service of the foregoing statement of points to be relied upon and designation of parts of the record necessary for consideration thereof and receipt of a copy thereof are hereby acknowledged this 20th day of September 1943.

DAN MACDOUGALD,
Dan MacDougald,
Attorney for Appellees.

[File endorsement omitted.]

42 Supreme Court of the United States

Order noting probable jurisdiction

October 25, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is set for argument immediately following No. 226, Polish National Alliance of the United States of North America vs. National Labor Relations Board.

[Endorsement on cover:] Enter Atty. Genl. File No. 47847. D. C. U. S., N. Georgia. Term No. 354. The United States of America, Appellant vs. South-Eastern Underwriters Association et al. Appeal from the District Court of the United States for the Northern District of Georgia. Filed September 15, 1943. Term No. 354 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 354

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, ET AL

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this case on August 5, 1943. A petition for appeal was filed on August 30th, 1943, and is presented to the District Court herewith, to wit, on the 30th day of August 1943.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in

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this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C. sec. 682, commonly known as the Criminal Appeals Act, and by 28 U. S. C., sec. 345.

STATUTE INVOLVED

The pertinent provisions of Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. secs. 1 and 2, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

THE ISSUES AND THE RULING BELOW

The indictment is in two counts. The first count charges a violation of Section 1, and the second count a violation of Section 2, of the Sher-

man Act. The defendants are South-Eastern Underwriters Association (referred to as SEUA), an unincorporated association composed of stock fire insurance companies doing business in Alabama, Florida, Virginia, North Carolina, South Carolina, and Georgia; nearly 200 stock fire insurance companies which are members of SEUA; and 27 individuals who are officers or members of the executive committee of SEUA.

The first count, prior to the charge of conspiracy, makes the following allegations, which are realleged and incorporated in count two (par. 27):

Insurance companies do business both through brokers and local agents (par. 16). The local agents, who are usually compensated on a commission basis and may represent more than one company (par. 9), accept or refuse "offers" for insurance, issue policies on forms supplied by the company, mail daily reports to the company, collect premiums, adjust certain losses, send the company monthly statements of their accounts and pay the company within a stipulated time the balance thereby shown due (par. 18). They are supervised by general agents of the appointing company or by its field men or other employees and officers (par. 18). On policies written by an agent, the company accepts the policy or orders it cancelled as it deems fit (par. 16). After a loss occurs and it has been adjusted, the company mails the local agent a check or draft for delivery to the policyholder (par. 18).

Fire insurance coverage "is essential to and directly affects the flow of interstate commerce" (par. 15). It affords necessary protection against the risk of certain kinds of losses to goods, valued in the billions, constantly moving in interstate commerce (par. 15). The property insured by the defendant companies includes steamboats, shipyards, warehouses and terminals, railroad equipment and rolling stock, and goods of all kinds carried in interstate and foreign commerce (par. 13). The premiums collected by stock fire insurance companies in SEUA States exceeded $52,000,000 in 1941, of which about 90% was collected by the defendant companies (par. 13). Of the nearly 200 defendant fire insurance companies, only 18 have their principal or home offices in SEUA States (par. 19).

SEUA maintains inspection and rating bureaus in each of the SEUA States except Virginia (par. 20). These bureaus examine daily reports submitted by agents of the defendant companies for the purpose of enforcing conformity to the rates, forms, rules and regulations prescribed by SEUA (par. 12).

Count one charges a conspiracy to fix and maintain arbitrary and noncompetitive rates in fire insurance sold by the defendants in SEUA States and count two charges a conspiracy to monopolize trade and commerce in fire insurance in these States (pars. 21, 28). Each count charges that

the conspiracy has consisted in a continuing agreement and concert of action to sell insurance, and to pay commissions to agents, at rates established and fixed by SEUA; to adhere to standard terms, conditions and clauses relating to coverage of risks established by SEUA; to withdraw reinsurance facilities from fire insurance companies not members of SEUA; to withdraw from any agency representing any such nonmember; to boycott persons purchasing insurance from nonmembers; and to maintain inspection and rating bureaus to police and further the foregoing agreements and practices (pars. 22, 29).

There are adequate allegations as to jurisdiction and venue in each count (pars. 25, 32).

The defendants all joined in a single demurrer upon the ground, among others, that the "business of fire insurance is not commerce" and that the charges laid in the indictment therefore do not come within the Sherman Act.[1] The court, in sustaining the demurrer upon this ground, said that the issue was not whether "Congress had power to regulate the insurance companies or some phases of their activities, but rather whether Congress did so by the Sherman Act." It said that

[1] Two other grounds of demurrer, upon which the district court did not rule, were that the interpretation of the Sherman Act upon which the indictment is based violates rights reserved to the States by the Tenth Amendment and that the indictment fails to apprise the defendants of the nature of the offenses charged, in violation of the Fifth and Sixth Amendments.

the Supreme Court had repeatedly held "that the business of insurance is not commerce, either intrastate or interstate" and that "the finding by the Supreme Court that the business of insurance is not commerce, seems to me to demand the finding that the business of insurance is not 'interstate trade' and is not covered by the Sherman Act." The court also said:

> Counsel for the Government concede that in the numerous decisions cited the Supreme Court has held that the business of insurance is not commerce, yet, strangely enough, ask this Court to rule directly to the contrary. Of course the Supreme Court decisions must be followed by this Court. The indictment does not disclose any facts or differences in this case which would remove it from the controlling effect of the decisions of the Supreme Court holding that the business of insurance is not commerce.

The sole basis for the ruling of the district court was that the business of fire insurance is not "trade or commerce" within the meaning of the Sherman Act. The court did not, as an additional or subsidiary ground of decision, hold that if this business is trade or commerce within the Sherman Act when carried on across State lines, the indictment was nevertheless insufficient because it failed to show that the trade or commerce which the defendants were charged with restraining and monopolizing was interstate. Cf. *United States* v. *Swift & Co.*, 318 U. S. 442. It is there-

fore clear that the decision of the district court is based upon a construction of the Sherman Act and that there is a direct appeal to this Court under the Criminal Appeals Act. *United States v. Patten*, 226 U. S. 525; *United States v. Borden Co.*, 308 U. S. 188.

THE QUESTION IS SUBSTANTIAL

We submit that the district court misapplied the holdings in the insurance cases. These cases all involved the validity of State regulation or taxation of insurance companies. The decision in each case was that the State legislation was not such an exercise of control over, or an imposition of burdens upon, interstate commerce as to be an assumption of power over interstate commerce prohibited by the Commerce Clause. But decisions upholding State regulation or taxation against the contention that it unconstitutionally trenches upon the power over interstate commerce reserved to the national Government do not mark the limits of the power of Congress under the Commerce Clause (*Swift & Co. v. United States*, 196 U. S. 375, 400; *Stafford v. Wallace*, 258 U. S. 495, 525) or the limits of what is commerce within that Clause (*South Carolina State Highway Dept. v. Barnwell Bros. Inc.*, 303 U. S. 177).

This Court has recently pointed out that many of the prior decisions dealing with the Commerce Clause are to be interpreted in the light of the

fact that their point of departure was, in a sense, one-sided. In *Wickard* v. *Filburn*, 317 U. S. 111, 121, the Court said:

> For nearly a century, however, decisions of this Court under the Commerce Clause dealt * * * almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period * * * the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference * * * was often some concept of sovereignty thought to be implicit in the status of statehood.

The bearing of the above quotation on the insurance cases is shown by the leading decision in this field since *Paul* v. *Virginia*, 8 Wall. 168. In *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 509, the Court said:

> We have already pointed out that if insurance is commerce and becomes interstate commerce whenever it is between citizens of different States, then all control over it is taken from the States and legislative regulations which this court has heretofore sustained must be declared invalid.

The fears thus expressed as to the effect upon State legislation of a holding that the business of insurance is commerce or interstate commerce

must, in the light of later decisions, be regarded as unfounded. *South Carolina State Highway Department* v. *Barnwell Bros., Inc., supra; Western Livestock* v. *Bureau of Revenue*, 303 U. S. 250.

If attention is directed to the question of what is "commerce" apart from what is commerce among the States, we see no reason in principle why a contract for the sale of goods should be commerce and a contract for the sale of a service should not be commerce. The business of Group Health Association consisted in making and carrying out agreements to provide medical services and hospitalization in return for monthly advance payments. This Court had no difficulty in determining that its business was "trade or commerce" within Section 3 of the Sherman Act. *American Medical Ass'n* v. *United States*, 317 U. S. 519. The business of cleaning and dyeing clothes does not involve the sale of a commodity. It is a service, performed for a charge, but an agreement to fix prices for such service is a restraint of trade or commerce within Section 3. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427. Moreover, it is settled today that the "commerce" of the Commerce Clause covers every kind of interstate communication or commercial intercourse and is not confined to the interstate movement of persons or commodities. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103;

Fisher's Blend Station v. *Tax Commission*, 297 U. S. 650.

If, as indicated above, providing the service of fire insurance is commerce, the commerce which the defendants are charged with restraining is commerce among the States. To restrain competition in the fire insurance business is to restrain not merely the writing of the contract of fire insurance itself but also those acts performance of which is required by the contract. The essential acts so required are payment of the loss by the insurance company if a loss occurs and, on the part of the insured, payment of the agreed premiums. Under the allegations of the indictment (par. 18), the insurance company pays the loss by check or draft sent to the insured and the premiums paid by the insured are transmitted, through agents, to the insurance company. Such payments, involving a regular flow of funds in large amounts across State lines,[2] are, we submit, clearly interstate commerce. *National Labor Relations Board* v. *Bank of America Nat. Trust & Savings Ass'n*, 130 F. (2d) 624, 626 (C. C. A. 9), certiorari denied, April 19, 1943 (Nos. 758, 759, October Term 1942).

The National Labor Relations Act has been held to apply to the employees of a life insurance company, both on the ground that such a com-

[2] The indictment shows (par. 19) that over 90% of the defendant insurance companies have their principal offices outside SEUA territory.

pany is "engaged in interstate commerce" and on the ground that a dispute between it and its employees would affect interstate commerce (*Polish National Alliance* v. *National Labor Relations Board* (C. C. A. 7, 6/5/43)), petition for certiorari pending, No. 226, this Term.[3]

Furthermore, the indictment alleges that the business of the defendants includes writing fire insurance on goods moving in interstate and foreign commerce. Protection of property, by insurance, against the risk of loss by fire and other like causes is universally deemed essential to the carrying on of commerce. Fire insurance policies on goods moving interstate are therefore an instrumentality of interstate commerce just as a bill of lading issued on such goods is an instrumentality of interstate commerce (*United States* v. *Ferger*, 250 U. S. 199). A conspiracy to restrain interstate commerce by monopolizing contracts for the future delivery of a commodity is, because of its necessary effect on interstate commerce, a restraint thereof (*United States* v. *Patten*, 226 U. S. 525). A conspiracy to restrain or to monopolize an instrumentality of interstate commerce must, for a like reason, be deemed a restraint or monopolization of interstate commerce. We submit, therefore, that the indictment

[3] In *Hinkler* v. *83 Maiden Lane Corp.* (S. D. N. Y., 5/14/43), C. C. H. Labor Cases par. 64701, there is a clear-cut dictum that insurance companies are "engaged in interstate commerce."

states a valid cause of action in charging that the defendants' conspiracy to restrain and to monopolize the fire insurance business embraced policies of insurance on goods moving in interstate and foreign commerce.

If the activities which the indictment charges as being violations of the Sherman Act are a restraint or monopolization of "commerce" within the meaning of the Commerce Clause, we submit that they fall within the Sherman Act. That statute, as to the types of restraints to which it applies, was designed to cover the full area of the commerce power of Congress. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495; *Atlantic Cleaners & Dyers, Inc.* v. *United States, supra*, pp. 434–435.

The defendants contended in the district court that a large body of State legislation dealing with insurance companies looks toward rate uniformity and curtailment of competition and is "diametrically opposed to the competitive theory of the Sherman Act."

The legislation referred to merely authorizes the filing of rates with rating bureaus or provides that a company shall not deviate from its filed rates unless notice of deviation is filed with or approved by the State Insurance Department. The Sherman Act would not invalidate legislation authorizing the filing of independently determined rates with a common bureau nor legislation re-

stricting rate deviations by which preference might be given favored customers. See *Parker* v. *Brown*, 317 U. S. 341. The practices charged in the indictment, that the various companies agreed upon uniform rates, are of a totally different character.

We believe that the question presented in this case is substantial and it is plainly one of public importance. The Government has made a general investigation of the practices of fire insurance companies and it contemplates bringing further proceedings under the Sherman Act against other combinations of these companies.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

Filed Aug. 30, 1943.

In the District Court of the United States for the Northern District of Georgia, Atlanta Division

No. 16920—Criminal Action

The United States of America, plaintiff

v.

South-Eastern Underwriters Association, et al, defendants

OPINION ON DEMURRER

On November 20, 1942, an indictment was returned by a Grand Jury of this Court against one hundred and ninety-eight corporations and twenty-seven individuals, charging such corporations and individuals with a conspiracy to fix and maintain arbitrary and non-competitive rates on fire insurance sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, in violation of Section 1 of the Sherman Anti-Trust Act, 26 Stat. 209, and with a conspiracy to monopolize trade and commerce in fire insurance in said States in violation of Section 2 of the Act.

On January 13, 1943, defendants filed a demurrer challenging the sufficiency of the indict-

ment upon the grounds that, it charges no offense against the United States; that the business of fire insurance is not commerce; that the interpretation of the Act insisted upon would be a violation of the Tenth, Fifth and Sixth Amendments to the Constitution; and that the Court is without jurisdiction of the subject matter of the incident.

The case came on regularly to be heard on the demurrer and was argued orally and subsequently by briefs.

To constitute a violation of the Sherman Act, the restraint and monopoly denounced must be that of interstate trade or commerce, and, unless the restraint and monopoly charged in the indictment be restraint or monopoly of interstate trade or commerce, the indictment must fall.

It is not a question here of whether the defendants participated in some incidental way in interstate commerce or used in some instances the facilities of interstate commerce, but is rather whether the activities complained of as constituting the business of insurance would themselves constitute interstate trade or commerce, and whether defendants' method of conducting same amounted to restraint or monopoly of same. It is not a question as to whether or not Congress had power to regulate the insurance companies or some phases of their activities, but rather whether Congress did do so by the Sherman Act.

Persons may be engaged in interstate commerce, yet, if the restraint or monopoly complained of is not itself a restraint or monopoly of interstate trade or commerce, they may not be convicted of violation of the Sherman Act. The fact that they may use the mails and instrumentalities of interstate commerce and communication, and be subject to Federal regulations relating thereto, would not make applicable the Sherman Act to intrastate commerce or to activities which were not commerce at all.

The whole case, therefore, depends upon the question as to whether or not the business of insurance is interstate trade or commerce, and if so, whether the transactions alleged in the indictment constitute interstate commerce.

The Supreme Court has repeatedly held, during a period of seventy-five years, that the business of insurance is not commerce, either intrastate or interstate. They have done so unequivocally and unambiguously.

Paul v. *Virginia*, 8 Wall. 168;
Hooper v. *California*, 155 U. S. 648;
Noble v. *Mitchell*, 164 U. S. 367;
New York Life Insurance Co. v. *Cravens*, 178 U. S. 389;
New York Life Insurance Co. v. *Deer Lodge County*, 231 U. S. 495;
Bothwell v. *Buckbee, Mears Co.*, 275 U. S. 274;
Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250, 253.

This is not denied by the Government, but it maintains that in some of the cases the ruling was obiter and in others based upon a misconception and failure to comprehend the sweeping scope of the fire insurance business. (Government's Brief, pages 8 & 9). Neither of these positions is sound. In all of the above cited cases, the ruling was essential to the case and the reasoning of the Court showed most careful analysis and full consideration of the questions now raised and did not merely follow "without reconsideration or reason, the fallacy established in the dictum of *Paul* v. *Virginia.*" (Government's Brief, page 15.)

This is especially true in the elaborately argued and thoroughly considered case of *New York Life Insurance Co.* v. *Deer Lodge County, supra.*

The Court could not be clearer in its announcement than in the expressions, "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce," (*Hooper* v. *California,* 155 U. S. 648, 655); and, "Contracts of insurance are not commerce at all, neither state nor interstate." (*New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, 510).

The same reasoning applies to the word "trade" as used in Sections 1 and 2 of the Sherman Act. It has a different significance in Section 3, but this fact does not enlarge its meaning

in Sections 1 and 2. "Section 1 having been passed under the specific power to regulate commerce, its meaning necessarily must be limited by the scope of that power; and it may be that the words 'trade' and 'commerce' are there to be regarded as synonymous. On the other hand, Section 3, so far as it relates exclusively to the District of Columbia, could not have been passed under the power to regulate interstate or foreign commerce, since that provision of the section deals not with such commerce but with restraint of trade purely local in character." (*Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434).

This difference in the meaning of the word "trade" as used in the different sections of the Act is referred to and emphasized in the later cases of *Associated Press* v. *Labor Board,* 301 U. S. 103; *Apex Hosiery Company* v. *Leader,* 310 U. S. 469, and *American Medical Association* v. *United States,* 317 U. S. 519.

Under the extremely broad construction of the words "interstate commerce" by the Supreme Court, which has been so ably presented by counsel for the Government, it is difficult to conceive how the business of insurance could be interstate trade and yet not be interstate commerce. At any rate, the finding by the Supreme Court that the business of insurance is not commerce, seems to me to demand a finding that the business of

insurance is not "interstate trade" and is not covered by the Sherman Act.

In the case of *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, on page 495, the Court says:

> The addition of the words "of commerce among the several states" was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, *Atlantic Cleaners & Dyers* v. *U. S.*, 286 U. S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce.

The business of insurance is not interstate commerce or interstate trade, though it might be considered a trade subject to local laws, either State or Federal, where the commerce clause is not the authority relied upon. But where the exercise of power is under the commerce clause alone, as in cases under the Sherman Act, the "trade" must have reference to transactions in or which affect interstate commerce.

> This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for consti-

tutional reasons, are confined to transactions in or which affect interstate commerce. (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 498).

Here the "trade" pursued, if it be such, is that of conducting the business of insurance, which the Supreme Court has held to be local and not interstate in character.

Counsel for the Government concede that in the numerous decisions cited the Supreme Court has held that the business of insurance is not commerce, yet, strangely enough, ask this Court to rule directly to the contrary. Of course the Supreme Court decisions must be followed by this Court. The indictment does not disclose any facts or differences in this case which would remove it from the controlling effect of the decisions of the Supreme Court holding that the business of insurance is not commerce.

If there is to be any overruling of the long time of clear and thoroughly considered decisions of the Supreme Court, acquiesced in for seventy-five years by Congress and administrative agencies, it will have to be done by the Supreme Court itself, or by Congress.

The conspiracies charged in the indictment are not conspiracies in restraint of or to monopolize interstate trade or commerce. The indictment, therefore, does not charge Federal offenses and should be dismissed.

An order will be passed to accompany this opinion, sustaining the demurrer on Grounds 1, 2 and 5 thereof, and dismissing the indictment.

This 5th day of August 1943.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed in clerk's office at Atlanta, Georgia, August 5, 1943. F. L. Beers, Clerk.

In the District Court of the United States for the Northern District of Georgia, Atlanta Division

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No. 16920—Criminal Action

United States of America

v.

South-Eastern Underwriters Association, et al., defendants

The demurrer in the above case came on to be heard and was argued orally and subsequently by briefs.

After hearing, and upon consideration thereof, Grounds 1, 2 and 5 of the demurrer are sustained, and the indictment is hereby dismissed.

This 5th day of August, 1943.

E. Marvin Underwood,
United States District Judge.

Filed in clerk's office at Atlanta, Georgia, August 5, 1943, F. L. Beers, Clerk.

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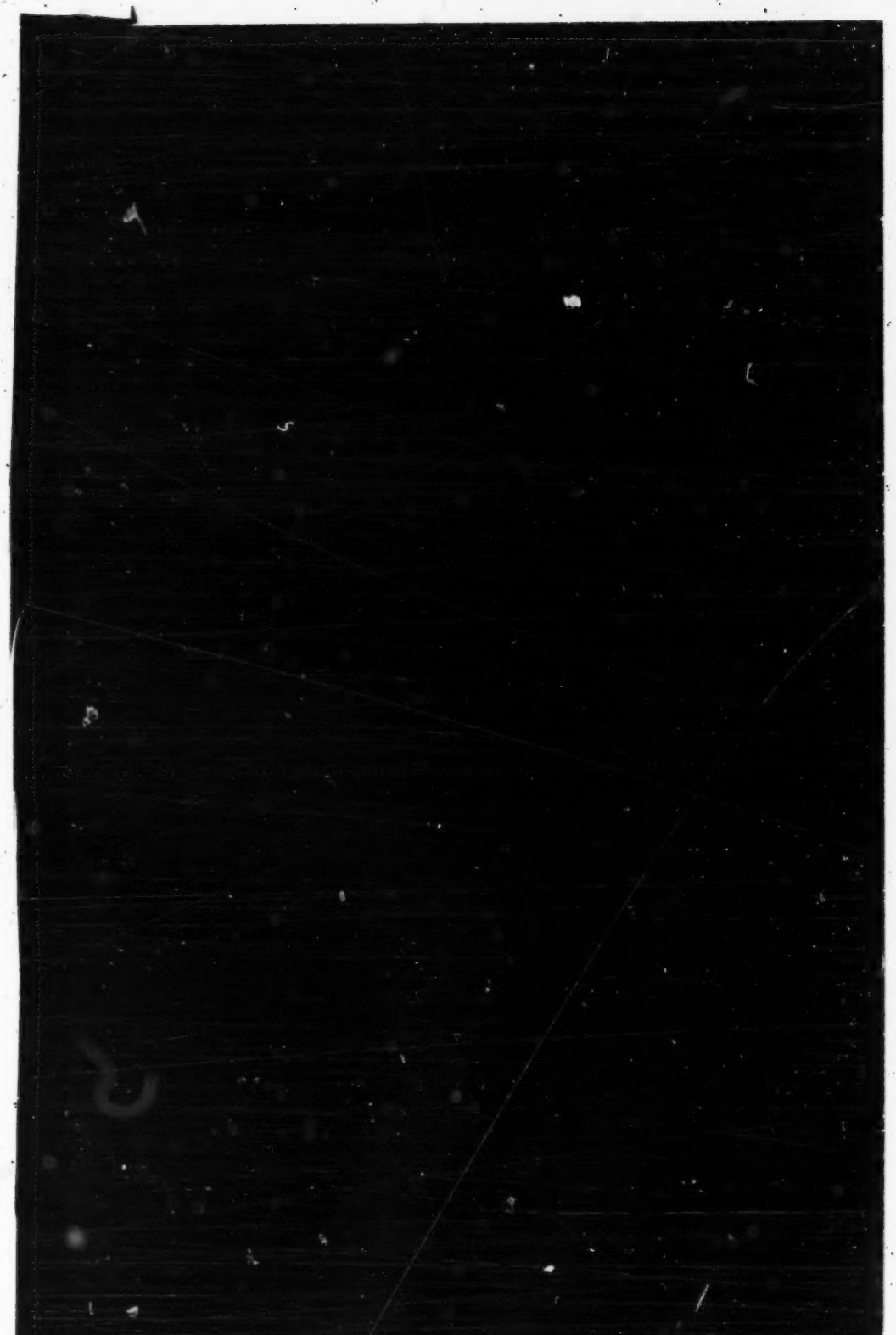

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Hearings, House Subcommittee on the Merchant Marine and Fisheries, 66th Cong., 1st sess., p. 283	54
House Committee on the Merchant Marine and Fisheries, Recommendations of Subcommittee of, printed with S. S. Huebner, *Report on Status of Marine Insurance in the United States*, p. 78, Government Printing Office, 1920	91
H. J. Res. No. 138, 56th Cong., 1st sess	83
H. R. 9629, 52d Cong., 1st sess	93
House Report No. 1501, 56th Cong., 1st sess	83
House Report No. 2491, 59th Cong., 1st sess	87, 88
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S. 7277, 58th Cong., 3d sess	93
Senate Report No. 573, 66th Cong., 2d sess	90
Cong. Globe, Pt. 2, 1669, S. 299, 40th Cong., 2d sess	25
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American Bar Association Committee on Interstate Law. Report entitled "Is Insurance Interstate Commerce?", 28 A. B. A. Rep. (1905) 498, 502–504	62
Articles of Confederation, Art. IX	46
Barclay, *A Complete and Universal Dictionary* (1774)	43
Barker, Charles Mylne, 29 American Bar Association Reports 558	50, 51
Barnes, *First Annual Report of the Superintendent of the Insurance Department of the State of New York* (1860)	23
Beck, James M., *The Federal Regulation of Life Insurance*, 181 North American Review (1905) 191, 199–200	38, 52

Miscellaneous—Continued. Page

Beeman, M. M., *Lloyds' London* (2d Ed., Kingswood, Surrey, 1937) 120
Bennett, Walter H., 300 Weekly Underwriter (1934) 27, The Eastern Underwriter, September 28, 1934, 20, 24 53
Benson, George J., *Federal Control of Insurance*, 6 The Brief (1906) 116, 121–122 54
Best's Insurance Reports, Fire and Marine Edition (1942) 14, 16, 67, 68, 112
Chamber of Commerce of the United States—Its Organization, Functions, and Services (June 27, 1938) 58
Chamber of Commerce of the United States, *Who's Who on the Board* 58
Cohen, Max, *New Conditions Demand New Remedies*, 1 Moody's Magazine (1905–1906) 53
89 Cong. Rec. (December 9, 1943) A-5777 ..... 112, 117
Cooke, Frederick H., *The Commerce Clause of the Federal Constitution* (1908) 38, 57
Dawson, Miles M., *A Case for National Supervision*, 1 Moody's Magazine (1905–1906) 312, 314 55
Dean, Albert F., *The Philosophy of Fire Insurance* (1925): Vol. I 15, 16, 67, 114, 116
DeCelles, *The Legal Aspects of Insurance Cost* (1936), 9, 11 ..... 113, 118
Dryden, Senator John F., *The Regulation of Insurance by Congress*, an address delivered before Boston Life Underwriters Association, November 22, 1904 ..... 54, 93
Dunham, Sylvester C., *Amend the Constitution, if Necessary to Obtain Supervision*, 1 Moody's Magazine (1905–1906), 291 53
Dyche, *A New General English Dictionary* (1761) 43
Edmunds, Senator George F., *The Interstate Trust and Commerce Act of 1890*, 194 North American Review (1911), 801 ..... 74, 77
Fouse, L. G., *State Regulation of Insurance*, 24 Annals, American Academy of Political and Social Sciences (1904), 69, 70, 80–82 ..... 53, 61
Gavit, Bernard C., *The Commerce Clause of the United States Constitution* (1932) 52, 56
Gephart, W. F., *Principles of Insurance* (1917): Vol. II: Fire 13, 61, 109, 111, 116
Gordon and Marchant, *A New Complete English Dictionary* (1760) 43
Hamilton, Alexander, 3 Works (Lodge Ed.), 202–203 47
Hamilton, Walton H., and Douglass Adair, *The Power to Govern* (1937) 43, 44, 47
Havighurst, Harold C., 143 Weekly Underwriter (1940), 1485 54

Miscellaneous—Continued. Page

Hepburn, Representative W. P., in *Organization and Law of the Department of Commerce and Labor* (1904), 579 53

Hess, Henry E., *An Argument for Insurance as Commerce and for National Supervision* (1904) 53

Huebner, S., *Federal Supervision and Regulation of Insurance*, 26 Annals, American Academy of Political and Social Sciences (1905), 681 38, 56

Huebner, S. S., *Property Insurance* (1922), Part I, Fire Insurance 13, 61, 113, 115, 116, 119

Huebner, S. S., *Report on Status of Marine Insurance in the United States* (Government Printing Office, 1920), 78 91

Innes, Reginald H., *Insurance in its Relation to the Commerce Clause of the Federal Constitution*, 48 American Law Register (1900) 717 53

Insurance Blue Book (Centennial Issue, 1876–1877) 22, 23

Johnson, *A Dictionary of the English Language* (1755) 43

Kingsley, Darwin P., *Insurance Supervision and National Ideals*, 189 North American Review (1909) 481, 492–496 53

Kersey, *Dictionarium Anglo-Britannicum: Or, A General English Dictionary* (1708) 43

Madison's Debates, as reported in H. Doc. No. 398, 69th Congress, 1st Sess., entitled *Documents Illustrative of the Formation of the Union of the American States* 46

Martin, *Lingua Britannica Reformata: Or, A New Universal English Dictionary* (1754) 43

Maxey, *Federal Control of Insurance*, (1905) 39 Am. L. Rev. 182 52

M'Curdy, R. A., 27 Insurance News 4 (1905) 53

Merritt Report (Report of Joint Committee of Senate and Assembly of State of New York, 1911), p. 125 128

Michelbacher, G. F., *Casualty Insurance Principles* (2nd Ed. 1942) 121–122 53

Moore, F. C., *Fire Insurance and How to Build* (1903) 61, 111, 119

Mowbray, Albert H., *Insurance, Its Theory and Practice in the United States* (1937) 13, 16, 61, 113, 114, 116, 117, 119

National Board of Fire Underwriters, Proceedings of the Executive Committee, February 18, 1868 24

Nehemkis, *Paul* v. *Virginia: The Need for Re-examination*, 27 Georgetown L. J. (1939) 519 22, 24

The Oxford English Dictionary (1893 Ed.) 42

Pink, Louis H., *The Problem of Fire Rates* (1942) 113

Pollock, Sir Frederick, 29 American Bar Association Reports (1906) 558 50

Randolph, Carman F., *Federal Supervision of Insurance*, 5 Col. L. R. (1905) 500, 513-516, 517 54

Reed, Prentiss B., *Fire Insurance Underwriting* (1940) 13, 67, 114, 119

Miscellaneous—Continued. Page

Richards, E. G., *The Experience Grading and Rating Schedule* (1921) 113, 114

Riegel, Robert, and H. J. Loman, *Insurance Principles and Practices* (1929) 61

Seward, George F., *Insurance is Commerce* (1910) 52

Shenton, Clarence G., *Interstate Commerce During the Silence of Congress*, 23 Dickinson Law Review (1918–1919), 78, 107, 139, reprinted in *3 Selected Essays on Constitutional Law* (Assn. of American Law Schools), 840–880 56

Smith, Adam, *The Wealth of Nations* (1937 Ed.), 23 20

Smith, Samuel Bosworth, *Shall We Have State or Federal Supervision?*, 13 The American Lawyer (1905), 372, 374, 376 54

Spectator, The, Fire Insurance Laws, Taxes and Fees, 1942 ..... 115, 119

Statistical Abstract of the United States (1942), 337 68

TNEC Hearings, part 10, pp. 4234–6, 4251, 4253 111

Tyler, Nat, *Federal Supervision in Interest of Policyholders*, 1 Moody's Magazine (1905–1906), 305, 307 53

Vance, William R., *Federal Control of Insurance Corporations*, 17 Green Bag (1905), 89 54

Van Vranken, R. F., 36 Eastern Underwriter (1935), 23 61

Walsh, John W., *National Supervision of Insurance and Paul v. Virginia*, 38 American Law Review (1904), 181, 187 53

Walsh, John W., *National Regulation of Insurance*, 30 National Corporation Reporter (1905), 434–435 53

Wandel, William Hamlin, *The Control of Competition in Fire Insurance* (1925) 67

Watson, David K., *The Constitution of the United States* (1910), 520, 521 53

Will, Arthur P., *Federal Regulation of Insurance*, 66 Central Law Journal (1908), 49, 53, 54, 55 54

Willoughby, W. W., *The Constitutional Law of the United States* (1910 Ed.), Vol. 2 38

Wilson, James, *1 Works* (edited by James DeWitt Andrews, 1896), 335 48

Wolfe, F. E., *Principles of Property Insurance* (1930), 2, 6–7 61

Wolfe, S. F., *State Supervision of Insurance Companies*, 26 Annals, American Academy of Political and Social Sciences (1905), 146–152 54

Wright, Charles, and C. Ernest, Fayle, *A History of Lloyds* (London, 1928) 122

Zartman, Lester W., and William H. Price, *Yale Readings in Insurance: Property Insurance* (1914) 15, 100, 113, 116, 118

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 354

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the Northern District of Georgia (R. 17–20) is reported in 51 F. Supp. 712.

JURISDICTION

The order of the District Court dismissing the indictment was entered on August 5, 1943 (R. 20–21). The petition for appeal was presented and allowed on August 30, 1943. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 345, and the Criminal Appeals Act of March

2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Sec. 682.

QUESTIONS PRESENTED

1. Whether the fire insurance business is in commerce.

2. Whether the fire insurance business is subject to the constitutional power of Congress to regulate commerce among the several states.

3. Whether, if so, the Sherman Act is violated by an agreement among fire insurance companies to fix and maintain arbitrary and non-competitive rates and to monopolize trade and commerce in fire insurance, in part through boycotts directed at companies not part of the conspiracy and the agents and purchasers of insurance who deal with them.

STATUTE INVOLVED

The pertinent provisions of Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C., secs. 1 and 2, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

STATEMENT

On November 20, 1942, the grand jury in the Northern District of Georgia returned an indictment against South-Eastern Underwriters Association (referred to as SEUA), an unincorporated association composed of stock fire insurance companies doing business in Alabama, Florida, Virginia, North Carolina, South Carolina, and Georgia; nearly 200 stock fire insurance companies which are members of SEUA; and 27 individuals who are officers or members of the executive committees of SEUA.

Count 1 of the indictment avers that appellees conspired to fix and maintain arbitrary and noncompetitive premium rates on fire insurance in restraint of the interstate trade and commerce described in the indictment (R. 10–12), and Count 2 charges that appellees conspired to monopolize trade and commerce in fire insurance in order to exclude others from engaging in the sale of fire insurance in interstate commerce (R. 13–14).

Each count charges that the conspiracy consisted of agreements among appellees to sell insurance and to pay commissions to agents at rates

fixed by the Association, and to withhold reinsurance facilities from, and prevent access to such facilities by, non-members of the Association (R. 11, 13). It is further charged that appellees have threatened to refuse and actually refused to deal with any agency which represents companies not members of the Association, have agreed to disparage and have disparaged the services and facilities of such companies, and have threatened to boycott and withhold patronage from persons purchasing fire insurance from such companies (R. 11, 13–14). It is averred that appellees have agreed to maintain and have maintained inspection and rating bureaus and local boards in order to police, strengthen and further the agreements and practices described (R. 11–12, 14).

The nature of the trade and commerce involved is set forth in paragraphs 13–20 of the indictment (R. 8–10). It is alleged that stock fire-insurance companies received about 85 percent of the fire insurance premiums in the United States, and that in 1941, appellees received approximately 90 percent of the amounts received by such companies in the six southeastern states (R. 8–9). In 1941 in those states, the premium income of the stock companies amounted to $52,000,000, of which $18,000,000 was paid out in losses (R. 8).

It is alleged that the appellees insure all kinds of properties, including industrial establishments,

instrumentalities of interstate commerce, and goods carried in commerce; that goods valued at billions of dollars are constantly moving in interstate commerce; and that fire insurance is essential in order to protect the shippers, consignees, warehousemen and common carriers of these goods against loss (R. 9).

The operations of the business through local and general agents are described (R. 9–10). It is alleged that the companies supervise these agents and maintain communication with them by mail, telegraph and telephone; that the agents solicit and issue policies subject to the disapproval of the companies, collect premiums, and transmit the amounts due to the companies and report losses; and that in case of loss, the companies mail to the agents checks or drafts for delivery to the policyholders (R. 9–10).

The states in which the appellees have their home offices are listed (R. 10). Ninety-three of the appellees maintain their home offices in New York, eighteen in Pennsylvania, sixteen in Connecticut, ten in New Jersey, and the remainder in various other states, with only eighteen in the six southeastern states (R. 10). Some of the appellees are organized to conduct a nation-wide business, and many do business in numerous states other than those which contain their home offices (R. 10).

It is alleged that the six southeastern states comprise the territory of the Association and that it maintains inspection and rating bureaus in Alabama, Florida, Georgia, North Carolina, and South Carolina (R. 10).*

On January 13, 1943, appellees filed a demurrer to the indictment upon the grounds that it did not state facts sufficient to constitute an offense against the United States, that the business of fire insurance is not commerce, and that the indictment is based upon an interpretation and application of the Sherman Act which would violate the Tenth, Fifth and Sixth Amendments to the Constitution.

On August 5, 1943, the District Court sustained the demurrer on the ground that in a proceeding under the Sherman Act the conduct restrained must be interstate trade or commerce, and that the decisions of this Court established that the business of insurance was not commerce.

SUMMARY OF ARGUMENT

I

A. The performance of the fire insurance contract and the operation of the fire insurance business require the movement of money, information, and documents on a large scale across state lines. These activities are both interstate and

* Virginia requires the fire insurance companies to establish a single rating bureau under the supervision of the State corporation commissioner. Va. Code 1942, § 4314 (1).

commerce within the meaning of the Constitution. Interstate commerce consists of all movement and intercourse across state lines, and most certainly includes all interstate transactions which are related to business and commerce in the narrowest sense.

B. *Paul* v. *Virginia,* 8 Wall. 168, and the cases following it, decide only that the states have power to regulate or tax the insurance business. The repeated statement in these cases that "insurance is not commerce" arose out of the Court's concern that otherwise the power of the states could not be sustained. But it is now established that even if interstate commerce is involved, the states may regulate matters not of national concern, and that cases relating to the scope of state power are of little value in ascertaining the extent of the power of Congress. Furthermore, the insurance business does not consist of isolated individual contracts of indemnity in which the only interstate feature is the transmission of the policy. The fire insurance business would not exist in its present magnified form, with the geographically diversified risks which insure its solvency, if it were not for the continuous use of the channels of interstate commerce for the transmission of instructions, information, papers, and money. These activities, which include the performance of the insurance contract, are unquestionably interstate commerce (cf. *Western Live Stock* v. *Bureau of Internal Revenue,* 303 U. S. 250, 253).

C. The insurance decisions are inconsistent with the many broad definitions of commerce stemming from *Gibbons* v. *Ogden*, 9 Wheat. 1, in which it has been recognized that commerce connotes every form of business activity. In particular, the insurance cases cannot be reconciled with (1) the decision that lottery tickets are subjects of commerce (*Champion* v. *Ames*, 188 U. S. 321), (2) the decision that an enterprise engaged in providing protection against the risk of undue medical expense is "trade" within the meaning of the Sherman Act (*American Medical Association* v. *United States*, 317 U. S. 519), and (3) the decision that marine insurance is an integral part of exportation, which is itself commerce (*Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19).

D. The statement that "insurance is not commerce" is also inconsistent with the meaning of "commerce" during the period in which the Constitution was adopted, as well as in more recent years. This appears from the usage of the eighteenth century, including that of members of the Constitutional Convention, from that of this Court in cases other than the series based upon *Paul* v. *Virginia*, and from that of the business and legal worlds generally. All agree that "commerce" embraces every phase of commercial and business activity, and that this includes insurance.

E. Furthermore, fire insurance may be regulated under the commerce power because it is

"practically a necessity to business activity and enterprise" (*German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 414; *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19). Congress has power to regulate and safeguard the availability of an instrumentality so essential to commerce. The nation-wide scope and the tremendous magnitude of the insurance industry also demonstrate that it falls within the limits of the federal commerce power.

II

A. The Sherman Act forbids every contract or combination "in restraint of trade or commerce among the several states." If the insurance business is in commerce, appellees' conduct plainly is proscribed by the literal language of the Act (cf. *American Medical Association* v. *United States*, 317 U. S. 519).

B. The history of the Act shows, and this Court has recognized, that Congress employed the words of the Constitution in the antitrust law for the very purpose of availing itself of all its constitutional power over restraints of trade. As in the Constitution itself, general terms were used with the understanding that they would be defined by the courts as cases arose. Although there was awareness of *Paul* v. *Virginia*, as there was of *Kidd* v. *Pearson*, 128 U. S. 1 and other cases holding that manufacture and production were not

subject to the Federal commerce power, there was no legislative intention, in the one case or the other, to freeze the Act in the judicial mold of 1890, or to deprive the Court of its prerogative to determine whether to adhere to prior decisions.

C. Nothing occurring since 1890 manifests a legislative intention that an exemption for insurance be read into the terms of the Sherman Act. Congressional references to the "insurance trust," the analogy of the manufacturing cases, the history of an exemption proviso for marine insurance, *inter alia*, suggest that Congress had no desire to give insurance preferential treatment if the Court should modify its constitutional views. Isolated instances which appellees cite do not sustain their burden of showing that the Act should not be construed to mean what it says.

D. Nor should an exemption be read into the Sherman Act upon the theory that competition among insurance companies is detrimental to the public interest. Such arguments have been made in the past and been uniformly rejected on the ground that such matters were for legislative and not judicial consideration. (See *Northern Securities Co.* v. *United States*, 193 U. S.; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 291.)

The enactment during the era of hostility to monopoly of twenty-three state antitrust laws specially directed at insurance companies demonstrates the climate of legislative opinion when the

Sherman Act was passed. Furthermore, analysis of the arguments as to why unrestrained competition among fire-insurance companies may be unwise, in the light of the rule of reason, the actual methods of operation in the industry, and the presence of existing and valid state regulations, demonstrates that application of the Sherman Act to fire insurance will not have any dire consequences, and that appellees have not made out such a case for special treatment as to warrant reading a special exception into the law.

E. Appellees' argument that a reversal of this Court's past doctrine would nullify the present state regulatory systems is irrelevant and exaggerated. Even if insurance is commerce within the meaning of the Constitution, the states are not precluded from taxing or regulating it, and the insurance decisions stand legitimately for the proposition that in the absence of a conflicting federal law, state regulation of the industry is appropriate. Nor is there merit in the contention that application of the Sherman Act will result in any general destruction of state regulatory systems. Furthermore, none of the state laws go so far as to authorize or justify the coercive tactics charged to appellees in this case.

ARGUMENT

INTRODUCTION

Appellees are charged with agreeing on the "price" of fire insurance (Count 1), and with

conspiring to monopolize the fire insurance business through coercion and boycotts directed at companies not members of the Association and at persons purchasing fire insurance from such companies (Count 2).[1] Such conduct in other industries unquestionably violates the Sherman Act when it relates to interstate commerce.

Appellees' primary contention in the court below was not that interstate commerce was not in fact restrained, or even that Congress lacked power under the commerce clause to regulate the insurance business, but that Congress had not done so in the Sherman Act. It is our position that Congress has such power, and that the Sherman Act is an exercise of all the power contained in the commerce clause with respect to restraints of the type in question.

Notwithstanding appellees' failure to press the constitutional objection below, the decisions of this Court make it necessary to deal with the constitutional issue. In Point I we shall show that the commerce power extends to appellees' activities because the fire-insurance business as carried on by appellees is both commerce and interstate commerce and because a restraint or monopoliza-

[1] Appellees have treated the case as one involving only the fixing of insurance rates, and argue that unrestricted rate competition would be unwise from an economic viewpoint. Whether or not the fixing of rates can be so justified, the justification would not extend to the boycotts, coercion, or other monopolistic tactics described in Count 2 of the indictment. See pp. 3–4, *supra*.

tion of that business burdens the commerce in the interstate industries insured. In Point II we shall consider appellees' contentions that an exemption in favor of insurance monopolies should be read into the sweeping language of the Sherman Act.

I

Appellees' Fire Insurance Business is Subject to the Federal Commerce Power

The Pertinent Facts

Although the case comes up on a record consisting solely of a pleading and a demurrer, the controlling facts as to the nature of the fire-insurance business are relatively few, and the indictment adequately summarizes them. Pertinent facts alleged that are not of common knowledge can readily be confirmed through resort to judicially noticeable descriptions of the fire-insurance business.[2]

Fire insurance is sold almost entirely by companies conducting a multistate business. Each company has a home office from which its activities radiate to the various states in which it sells insurance (R. 9–10). Over 87% of the business

[2] W. F. Gephart, *Principles of Insurance*, Vol. II: Fire (New York, 1917); S. S. Huebner, *Property Insurance* (New York, 1922), Part I, Fire Insurance; Albert W. Mowbray, *Insurance, Its Theory and Practice in the United States* (New York, 1937), chapters I–VI, XVI, XVII, XIX, XX, XXI; Prentiss B. Reed, *Fire Insurance Underwriting* (New York, 1940).

of the appellee companies is derived from states other than the home state.[3] Only 18 of the 196 appellees have their headquarters in the six southeastern states covered by the indictment (R. 10).

The fire insurance companies appoint general and local agents.[4] These agents, who are subject to company supervision, solicit prospects and accept or reject offers for insurance; the contracts are, however, subject to cancellation by the companies "as they deem fit" (R. 9). The contracts are performed on the part of the insured by the payment of premiums to the company. The premiums are collected by the local agents, and periodically are forwarded, minus the commissions due the agents, to the companies' home offices (R. 9, 10). The contracts are performed by the company by the payment of money to the insured if a loss occurs. After the amount of the loss has been determined, the company sends a check or draft to the local agent for delivery to the policy holder (R. 10). On the policies

[3] We have printed as an Appendix, *infra*, a tabulation from *Best's Insurance Reports, Fire and Marine Edition*, 1942, which shows the proportionate amount of premium income which each of the appellee companies (with minor exceptions) derives from the home state and from other states. The table shows that all but seven extremely small companies do business outside of the home State, and that of the companies whose total premium income exceeded two million dollars, the maximum percentage of business done in the home state was 39.51.

[4] Sometimes the general agents appoint and supervise the local agents (R. 9).

made outside of the home state, the money paid to the company by the insured and by the company to the insured in case of loss, crosses state lines.

The control exercised by the companies over the agents is illustrated by the requirement that the agents mail daily reports to the company (R. 9); the companies supervise the agents' activities, communicating with them by mail, telegraph, and telephone, send them blank forms of policies,[5] and as we have indicated, retain the right to cancel any contract made by the agents (R. 9).

The making of each contract for fire insurance is not to be regarded as an isolated transaction. The fire-insurance business exists only because the companies are able to issue a large number of policies covering many properties. An individual property owner can obtain insurance only because the risk of loss is widely spread. Indeed, the needs of the fire-insurance business require that each company spread its risks over a large geographical area, in order that a crippling loss may not result from a single conflagration.[6] The consequence is that the very nature of

[5] In this respect fire insurance differs from life insurance; the life insurance policy is prepared in and sent from the home office. Moreover, it has a security and investment value of its own. This will be developed in the brief for the Government in *Polish National Alliance* v. *National Labor Relations Board*, No. 226.

[6] See Zartman and Price, *Yale Readings in Insurance: Property Insurance* (1914) pp. 339–340; Dean, Albert F., *The*

the business causes the companies to operate in many states rather than as local concerns.[7] The scope of the business appears from the fact that in 1941 the premiums received by the stock fire insurance companies from the six southeastern states amounted to over $52,000,000 (R. 8);[8] in the United States the amount was $886,764,876.[9]

The properties insured by appellees include both homes and all types of businesses. Vessels, trucks and busses, railroad equipment and rolling stock, hangars, shipyards, warehouses, terminals, and all kinds of goods and merchandise transported in interstate commerce are covered by fire insurance (R. 9). Fire insurance protects shippers, warehousemen, and carriers against the risk of loss of property used in interstate business. "Fire insurance coverage is essential to and directly affects the flow of interstate commerce" (R. 9).[10]

Philosophy of Fire Insurance (1925), Vol. 1, pp. 109–110; Mowbray, A. H., *Insurance, Its Theory and Practice in the United States* (1937), pp. 360, 370.

[7] Cf. Dean, *loc. cit.*

[8] *Best's Insurance Reports*, 1942. Of this amount the appellee companies received approximately 90% (R. 8). Approximately $18,000,000 was paid out in losses (R. 8).

[9] See the table printed in Appendix, *infra*, compiled from *Best's Insurance Reports*.

[10] The sentence quoted from the indictment states a fact and not a conclusion of law. It epitomizes the experience of businessmen who would be reluctant to undergo the risk of engaging in these activities without protection against loss by fire. (See pp. 61–63, *infra*.)

A. THE INSURANCE BUSINESS IS IN INTERSTATE COMMERCE

These facts demonstrate that both the performance of the contract of insurance and the operation of the fire-insurance business viewed as a whole require the movement of money, information, and documents on a large scale across state lines. It cannot be, and we do not think that it is, questioned that these activities are interstate.[11] The contention has been that they are not "commerce."

This presupposes that some forms of movement and intercourse across interstate lines are not interstate commerce in the constitutional sense. Except for the line of cases dealing with insurance, our views as to the erroneous character of which are advanced *infra*, pp. 22–69, the decisions of this Court are to the contrary and establish that all movement across state lines is interstate commerce. Cattle ranging across state lines are in commerce.[12] So is the moving of a woman from one state to another to engage in an immoral but noncommercial activity;[13] a kidnapper holding a public officer for protection and not for ransom;[14]

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[11] Cf. *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 510.

[12] *Thornton* v. *United States*, 271 U. S. 414.

[13] *Caminetti* v. *United States*, 242 U. S. 470. Cf. *United States* v. *Burch*, 226 Fed. 974 (N. D. Cal.) (transportation by private automobile).

[14] *Gooch* v. *United States*, 297 U. S. 124.

and a person walking across an interstate bridge.[15] A bottle of liquor carried across a state line by a man for his personal use,[16] and oil transported in a private interstate pipe line for the use of the carrier are in commerce.[17] The sending of information, whether by telegraph, telephone, or radio is unquestionably interstate commerce.[18] And the interstate transmission of pieces of paper, which are more tangible than electric waves but which may have no intrinsic value of their own[19] apart from the rights they represent, is also interstate commerce. This is true not only as to paper money and securities, which often contain only a promise to pay,[20] but also of lottery tickets,[21] the value of

[15] *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204.

[16] *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465. In the *Simpson* case the transportation was by private car and not by common carrier.

[17] *Pipe Line Cases*, 234 U. S. 548; *Valvoline Oil Co.* v. *United States*, 308 U. S. 141.

[18] *Pensacola Tel. Co.* v. *Western Union*, 96 U. S. 1; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103.

[19] Paper, of course, is a commodity as much as anything else. Cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52. This is true even when its value is created by what is printed on it. *Ramsay Co.* v. *Associated Bill Posters*, 260 U. S. 501 (posters); *Indiana Farmers Guide Pub. Co.* v. *Prairie Farmers Pub. Co.*, 293 U. S. 268; *International Textbook Co.* v. *Pigg*, 217 U. S. 91.

[20] *Securities and Exchange Commission* v. *Joiner Leasing Corp.*, No. 24, decided Nov. 22, 1943; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 433.

[21] *Champion* v. *Ames*, 188 U. S. 321.

which is both contingent, and dependent, since they are unenforceable, upon the good faith of the seller. The performance of servicing contracts and of a correspondence course through the mails has been regarded as interstate commerce.[22]

These cases establish that interstate commerce consists of all kinds of movement across state lines whether or not "commercial" in the sense of business transactions. The historical background of the commerce clause, referred to *infra*, pages 42–48, shows that they were correctly decided. But it is not necessary to resort to any such broad principle in the present case. For we think it plain that the transmission of money by both parties in performance of a contract of insurance, and of information and instructions which are the essence of the insurance business commercial in the narrowest sense. It is certainly much more so than most of the transactions held to be interstate commerce in the foregoing cases.

We do not think this would ever have been doubted if the property which moved in performance of the insurance contract had not been money or checks, or if the performance on one side of the contract had not been contingent on the oc-

[22] *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 432; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; cf. *Indiana Farmers Guide Pub. Co.* v. *Prairie Farmer Pub. Co.*, 293 U. S. 268.

currence of loss.[23] If a person in one state buys sugar to be shipped from another state, the contract of sale is both commerce and interstate commerce. Its commercial character would not be lessened if the obligation to ship the sugar were made contingent upon a certain event, particularly if the contingency had a real and vital relationship to the efficient and continuous operation of the seller's business.[24] Or let us suppose that persons with a lack of faith in the value of money establish an enterprise for insurance in kind. Manufacturers of sugar, for example,[25] might agree to ship a small percentage of their stock per month to a central warehouse; in case of fire the owner of the warehouse would ship back to them the amount of sugar destroyed. The transportation of the sugar to and from the warehouse would plainly be commerce, and if across state lines, interstate commerce. The transactions would be commercial in the strictest sense.

These cases differ from the present one only in that the performance of the insurance contract

[23] In life insurance only the time of performance by the company is contingent.

[24] Compare the purchase and sale of commodities for future delivery. *United States* v. *Patten*, 226 U. S. 525; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

[25] At one time, in the West Indies, sugar was used as a medium of exchange; cattle, salt, shells, dried cod, tobacco, hides and nails have also been so used (Adam Smith, *The Wealth of Nations* (1937 ed.), p. 23).

consists of the exchange of money (usually in the form of a bank check) instead of a more tangible commodity. But money and checks are undoubtedly subjects of commerce,[28] and the fact that a convenient medium of exchange is employed does not render a transaction non-commercial.

For these reasons the performance of the individual contract of insurance is a commercial transaction. Even more clearly—if that be possible—the widespread activities of the insurance companies viewed as a whole are commercial. Their business in large part consists of the transmission and receipt of vast sums of money and the unceasing use on a large scale of the channels of communication. It is the business of insurance that appellees are charged with monopolizing.

That the insurance business is commercial also appears from its relation to other industries. Manufacturers, carriers, and shippers carry insurance as an ordinary business expense. They do not dare risk the destruction of their property by fire; furthermore, they cannot obtain the credit to finance their enterprises unless the property

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[28] *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624, 626 (C. C. A. 9), certiorari denied, 318 U. S. 791, 792. The National Stolen Property Act specifically includes money within the types of stolen property to which it applies, 18 U. S. C., §§ 413-419. The paucity of authorities for this proposition is probably accounted for by the fact that no one has ever doubted it.

is insured.[27] An operation which is so essential to commerce can hardly be described as non-commercial.

B. THE INSURANCE CASES[28] ARE NOT CONTROLLING

Paul v. *Virginia,* 8 Wall. 168 (1868), and the decisions following it can best be understood if placed in their proper legal and historical perspective.[29]

Upon the close of the Civil War the insurance business, along with industrial activity generally, underwent a tremendous expansion accompanied by abuses of the most flagrant sort.[30] "Some companies, chartered by the legislature as insurance companies, were organized for the purpose of providing one or two of their officers, at headquarters, with lucrative employment—large compensation for light work—not for the purpose of insuring property; for the payment of expenses, not of losses" (*DeLancey* v. *Insurance Co.,* 52 N. H. 581, 587 (1873)). The Missouri Superin-

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[27] See p. 16, *supra;* pp. 61–64, *infra.*

[28] By the "insurance cases" we mean *Paul* v. *Virginia,* 8 Wall. 168, and the subsequent series of decisions stating that "insurance is not commerce." There are, of course, a great many other decisions dealing with the insurance business, some of which adopt quite a different approach.

[29] The historical background of *Paul* v. *Virginia* is set forth in Nehemkis, *Paul* v. *Virginia: The Need for Re-examination,* 27 Georgetown L. J., 519 (1939).

[30] See *Insurance Blue Book* (Centennial Issue, 1876–1877), c. VI, "Fire Insurance 1860–1869," pp. 29–34.

tendent of Insurance reported with respect to the same period that "some [insurance companies] kept but few books of any kind, and these in so slovenly a manner that even the officers could tell nothing about the entries. The agents covered the State, wrote on specious and novel plans, and defrauded without fear of penalty. The mutuals were most productive of fraud and mischief. There was nothing to prevent their organization by any poverty-stricken adventurer."[31]

In order to safeguard their citizens against such activities on the part of insurance companies, various states enacted protective legislation.[32] In 1866 Virginia enacted a law requiring insurance companies not incorporated in the state to obtain a license before doing business therein; such a license could not be obtained until bonds of a certain type (which were to be sold if necessary to satisfy the company's liabilities) were deposited with the state treasurer.[33] Paul, a Virginia resident, was appointed agent for several New York fire insurance com-

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[31] This report is quoted in *Insurance Blue Book*, *op. cit.*, *supra*, p. 34. See also Barnes, *First Annual Report of the Superintendent of the Insurance Department of the State of New York* (1860), 4.

[32] *Insurance Blue Book*, *supra*, n. 30. This legislation was also prompted by the general fear of the growing power of foreign corporations during the period preceding and immediately following the Civil War. See Nehemkis, *supra*, note — (cf. *Bank of Augusta* v. *Earle*, 13 Pet. 519).

[33] Acts Va., 1865–1866, c. 2, sec. 47; c. 96.

panies. He applied for a license, but refused to comply with the requirement for the deposit of bonds. The license was refused, but he nevertheless proceeded to sell insurance. He was indicted and convicted for having sold insurance in the state without a license.

During this period the insurance companies were seeking relief generally "from the aggressive acts of hostile [state] legislatures."[34] In 1868 a committee of the National Board of Fire Underwrifers reported on "the first duty" assigned to it, namely, "proposing some practicable plan to rid the country of unfair state legislation" and of "securing, if possible, one general law for the government of Insurance Companies throughout the Union."[35] The Committee also urged the necessity for a "test case in opposition to the more monstrous exactions of some of the States, and [to] obtain the decision of the Supreme Court of the United States thereon, with the view to settle forever the unconstitutionality of all such unequal and proscriptive State legislation."[36] Virginia's prosecution of Paul was to be the test case.

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[34] *Insurance Blue Book*, *op. cit.*, *supra*, n. 30, at 32; Nehemkis, *op. cit.*, *supra*, at 525.

[35] See, *National Board of Fire Underwriters*, *Journal of the Proceedings of the Second Annual Meeting* (*Proceedings of the Executive Committee*, February 18, 1868), 25.

[36] *Id.*, at 26.

The issue presented to the Court was whether the states were to have power to safeguard their citizens through the regulation of foreign fire insurance companies. There was no federal legislation on the subject; indeed, a bill submitted by the insurance companies and proposing federal incorporation in order to eliminate numerous restrictions imposed by the states had been rejected by Congress early in 1868.[37] Moreover, in considering the likelihood of control through effective legislation by Congress, the Court could not have been unaware that not a single regulation of business under the commerce power had been enacted by Congress in the seventy-nine years since the Constitution was adopted.[38] The Court was thus faced with the alternative of approving state regulation or, by striking it down, of leaving no effective check upon the irresponsible activities of insurance companies. Accordingly it sustained the validity of the Virginia bonding requirement, which, of course, was related to the protection of Virginia's citizens against dishonest or irresponsible insurers.

The Court could better have reached this conclusion by declaring that whether or not insur-

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[37] S. 299, 40th Cong., 2d Sess., Cong. Globe, 40th Cong., 2d Sess., Pt. 2, 1669. This occurred on March 5, 1868; *Paul* v. *Virginia* was decided in the December Term 1868.

[38] Such legislation was still two decades away. See *Wickard* v. *Filburn*, 317 U. S. 111, 121.

ance was commerce or interstate commerce, state regulation of the subject was to be upheld, because in view of "all the relevant facts and circumstances it appears that the matter is one which [in the absence of any federal law on the subject] may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress." "When Congress has not exerted its power under the commerce clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved." (*Parker* v. *Brown,* 317 U. S. 341, 362, 363).

In that period, however, and apparently despite the doctrine of *Cooley* v. *Board of Port Wardens,* 12 How. 299, the Court often applied a more formal test.[39] If a matter was interstate

[39] E. g., *Nathan* v. *Louisiana,* 8 How. 73; *Railroad Co.* v. *Husen,* 95 U. S. 465; *Coe* v. *Errol,* 116 U. S. 517; *Bowman* v. *Chicago & N. W. Railway Co.,* 125 U. S. 465; *Leloup* v. *Mobile,* 127 U. S. 640; *Kidd* v. *Pearson,* 128 U. S. 1; *Rhodes* v. *Iowa,* 170 U. S. 412; *Caldwell* v. *North Carolina,* 187 U. S. 622. Cf. *Leisy* v. *Hardin,* 135 U. S. 100. In other cases during the same period the Court applied the formula of

commerce, only Congress could regulate it; if it was not, only the states could regulate it. As the opinion in *Paul* v. *Virginia* states, in quoting from *Nathan* v. *Louisiana*, 8 How. 73:

> The federal government can no more regulate the commerce of a State than a State can regulate the commerce of the federal government.

In the cases following *Paul* v. *Virginia*, the Court showed that the basic reason for the decision was its fear that if insurance were held to be commerce and accordingly subject to the federal power, the effect would be to "exclude state control" (*Hooper* v. *California*, 155 U. S. 648, 655). The thought was most explicitly enunciated in *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 509; the Court there said:

> We have already pointed out that if insurance is commerce and becomes interstate commerce whenever it is between citizens of different States, then all control over it is taken from the States and the legislative regulations which this court has

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the *Cooley* case, which does not differ substantially from that presently approved. *Munn* v. *Illinois*, 94 U. S. 113; *Smith* v. *Alabama*, 124 U. S. 465; *Nashville C. Etc. Ry.* v. *Alabama*, 128 U. S. 96; *Western Union Tel. Co.* v. *James*, 162 U. S. 650; *Gladson* v. *Minnesota*, 166 U. S. 427. Cf. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489.

heretofore sustained must be declared invalid."[40]

Paul v. *Virginia* and the *Hooper* and *Deer Lodge* cases contain the most complete expressions of the reasoning behind the oft-repeated statement that "insurance is not commerce"; the other decisions in this line[41] do little more than follow or quote from them. All of the cases involve the validity of state tax and regulatory legislation, and we think it fair to say that in all of them the Court was primarily concerned with maintaining the power of the states to regulate the insurance business.

In *Parker* v. *Brown*, 317 U. S. 341, 360–363, the Court noted that prior decisions involving the validity under the commerce clause of state legislation had approached the problem in two ways. One group of cases applied a "mechanical test" and determined whether a particular state law was valid by ascertaining whether the conduct reg-

[40] This statement seems difficult to reconcile with the analysis in *The Minnesota Rate Cases*, 230 U. S. 352, decided at the preceding term. Mr. Justice Hughes, the author of the latter opinion, and Mr. Justice Van Devanter dissented in the *Deer Lodge* case.

[41] See *Ducat* v. *Chicago*, 10 Wall. 410 (1870); *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566 (1870); *Phila. Fire Association* v. *New York*, 119 U. S. 110 (1886); *Noble* v. *Mitchell*, 164 U. S. 367 (1896); *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389 (1900); *Nutting* v. *Massachusetts*, 183 U. S. 553 (1902); *Northwestern Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132 (1918); *National Ins. Co.* v. *Wanberg*, 260 U. S. 71 (1922); *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274 (1927).

ılated was interstate or intrastate. See cases ited, 317 U. S. at 360–361. Other decisions con- sidered whether the state law unduly burdens nterstate commerce, and the courts are reluctant o find undue interference where no national olicy is obstructed. See pp. 121–122, *infra* and *The Minnesota Rate Cases*, 230 U. S. 352, 400–411, and cases cited; *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 505–506, and cases cited. Recent decisions in the main dopt the latter test.[42]

Although a number of the cases involving state egislation contain remarks suggesting that the ame mechanical test determines the scope of the ederal power,[43] only a few cases have actually pplied the rule to a federal regulation.[44] Except or the remarks in the insurance cases, these de- isions have been abandoned or repudiated.[45] It s by now definitely established that cases sustain- ng the validity of state laws are not to be taken s holding that Congress has no power under the ommerce clause to enter the same field. This Court has said time and again that cases uphold- ng state tax or regulatory statutes, "as not con-

[42] See cases cited pp. 121–122, *infra*.

[43] E. g., *Veazie* v. *Moor*, 14 How. 568; *Kidd* v. *Pearson*, 128 U. S. 1; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172.

[44] *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604; *Employers' Liability Cases*, 207 U. S. 463.

[45] See *Wickard* v. *Filburn*, 317 U. S. 111, 121–123, and cases cited.

stituting an interference with interstate commerce, are of little value" (*Binderup* v. *Pathe Exchange,* 263 U. S. 291, 311) when the inquiry is as to the scope of the powers of Congress. In such cases the question "is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority" (*Bacon* v. *Illinois,* 227 U. S. 504, 516; *Stafford* v. *Wallace,* 258 U. S. 495, 526; *Swift & Co.* v. *United States,* 196 U. S. 375, 400; *Minnesota* v. *Blasius,* 290 U. S. 1, 8; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 35; *Binderup* v. *Pathe Exchange, supra;* cf. *Wickard* v. *Filburn,* 317 U. S. 111, 121).

These observations apply to the insurance cases, inasmuch as every one of them involved the validity of state legislation. The cases are therefore not controlling as to the scope of the power of Congress under the commerce clause.[46]

The emphasis upon the individual insurance policy as an isolated contract of indemnity also serves to differentiate the insurance cases from the facts at bar. The paragraph in *Paul* v. *Vir-*

[46] It follows that a decision in the instant cases that insurance is commerce and subject to the commerce power need not invalidate state taxes and regulations except to the extent that they are inconsistent with federal legislation. This is discussed at greater length, *infra,* pp. 121 *et seq.*

ginia from which its doctrine stems" shows that the Court was thinking solely in terms of the individual insurance contract, and of the transportation of the policy itself across state lines. The question was whether *the contracts* were "articles of commerce"; it was apparently assumed that nothing need be considered but the making of the contracts themselves, and that the performance took place entirely in Virginia.

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[47] This paragraph (8 Wall., at 183) reads as follows: "There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of idemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

We need not dispute the proposition that the mere making of a contract between persons in different states is not interstate commerce, or that it does not become so just because the written instrument is forwarded from one state to the other.[48] As we have shown, the indictment alleges that in performance of the fire-insurance contracts involved in this case money was sent across state lines both by the insured and by the companies; indeed, the parties undoubtedly contemplated that the contracts would be carried out through this use of the channels of interstate communication. When contracts require the interstate movement of property for their performance, the latter is both commerce and interstate commerce and plainly subject to the federal commerce power.[49] The implication in *Paul* v. *Virginia* that because the policies were contracts of indemnity they were not commercial transactions ignores these facts as to the manner in which insurance contracts are carried out.

In this case we are not concerned merely with insurance contracts but with the entire insurance business. Appellees are charged (Count 2)

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[48] But as to the latter, see pp. 17–19, *supra*. Life insurance policies have an investment value of their own and fall in a different category.

[49] A regulation of the terms of such contracts is a regulation of commerce itself (*Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394).

with conspiring to monopolize the fire insurance business, and specifically with conduct designed to force out of business companies not members of their association. We have no doubt that the performance of an insurance contract constitutes commerce, even if the contract can be looked at as an isolated local transaction, as it was in *Paul* v. *Virginia*. But the business of insurance cannot be regarded as consisting either of isolated or local events. The fire insurance business would not exist in its present magnified form, with the geographically diversified risks which insure its solvency, if it were not for the continuous use of the channels of interstate commerce for the transmission of instructions, information, papers, and money. It is thus essentially an interstate business, the activities of which consist in large part of transactions in interstate commerce, that appellees are charged with monopolizing.

Our conclusion that the insurance cases are not controlling as to the validity of federal commerce legislation and that they are to be regarded as concerned only with the formation of contracts is confirmed by this Court's most recent reference to them. *Western Live Stock* v. *Bureau of Internal Revenue*, 303 U. S. 250, 253, cites the insurance cases as standing only for the proposition "that the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least

in the absence of Congressional action, unless the performance is within its protection • • •." This statement seems clearly to imply that if the performance, as well as the making, of a contract is interstate, the transaction is subject to the protection of the commerce clause, and that even the contract itself may be regulated if Congress so provides. The present cases fall within both these categories. The performance of insurance contracts, as we have shown, consists of the transmission of money across state lines. And both this case and No. 226 arise under federal commerce legislation which reaches all conduct of specified types which restrains or affects interstate commerce. If the insurance cases are authoritative only to the qualified extent indicated in the *Western Live Stock* case, they are not pertinent to the issues presented in the cases at bar.

Other considerations also demonstrate the error in the generalization that "insurance is not commerce." It can be shown that that oft-repeated remark (1) is inconsistent with many other decisions of this Court, (2) is contrary to the historical meaning of the commerce clause, and (3) is not in accord with present understanding. This statement should be relegated to the place occupied by few other decisions in which the commerce clause has been construed without the con-

sideration of economic relationships which would have led to a different result."

C. THE INSURANCE CASES ARE INCONSISTENT WITH OTHER DECISIONS OF THIS COURT

Paul v. *Virginia* and the subsequent cases apparently conceived of "commerce" as consisting only of the sale and shipment of tangible commodities. This position, we believe, was an acceptance of the very argument rejected in *Gibbons* v. *Ogden*, 9 Wheat. 1, this Court's first and justly most famous decision under the commerce clause, in which it was vigorously argued that for the same reason "commerce" did not include navigation. Indeed, it is difficult to find a more discerning reply to the argument than that given by Chief Justice Marshall in 1824. His opinion states the contention and answers it as follows (9 Wheat., at 189):

> The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation.

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[30] *Hopkins* v. *United States*, 171 U. S. 578; *Adair* v. *United States*, 208 U. S. 161; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hammer* v. *Dagenhart*, 247 U. S. 251; *Carter* v. *Carter Coal Co.*, 298 U. S. 238. Sweeping statements found in cases sustaining state laws as to the limitations of the federal commerce power have also been disregarded (E. g., *Kidd* v. *Pearson*, 128 U. S. 1, 20–22; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259–260; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178–179).

> This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

In his concurring opinion in the same case, Mr. Justice Johnson further amplified the definition of "commerce."

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation.[51]

The activities of insurance companies are well described in the reference to "intelligence, care, and various mediums of exchange" as entering into commerce.

If we turn to more recent cases, the fallacy of the notion that commerce consists only of the buying and selling of tangible commodities is plainly demonstrated. This is established as a general proposition by the cases cited *supra*, pp. 17–19.

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[51] 9 Wheat., at 229–230.

And in *Jordan* v. *Tashiro,* 278 U. S. 123, 127–128, the Court, speaking through the present Chief Justice, reaffirmed the broad definition of "commerce" as follows:[52]

> While in a narrow and restricted sense the terms "commerce," or "commercial," and "trade" may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise (*Asakura* v. *Seattle, supra*). And although commerce includes traffic in this narrower sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse. (See *Gibbons* v. *Ogden,* 9 Wheat. 1, 189.)

Most closely in point are *Champion* v. *Ames,* 188 U. S. 321 (the *Lottery* case), and *American Medical Association* v. *United States,* 317 U. S. 519.

In the *Lottery* case, the subject of commerce was a lottery ticket, a piece of paper. This paper had value for which persons would pay, because it represented a promise, albeit an illegal one, by the manager of the lottery to pay the ticket holder money if a certain contingency, the

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[52] The question in the case was whether the words "trade" and "commercial" in a treaty applied to a hospital. The Court adopted the same approach as in construing the commerce clause, citing *Gibbons* v. *Ogden.*

drawing of the right number, occurred. The insurance contract, which is embodied in a piece of paper, also has value to the owner because it represents the promise of the company to pay if a certain contingency occurs. Owners of property are willing to pay considerable sums for this promise. The only difference between the two situations is that the insurance contract is issued by a company engaged in a legitimate business enterprise with beneficial social and economic objectives, often for the purpose of protecting the business and commercial interests of the insured, while the lottery ticket represents a pure gamble in an unlawful scheme entirely unconnected with business or commerce. The distinction between a lottery and the insurance business might conceivably lead to the conclusion that the latter was commercial and the former not. But if the lottery ticket is in commerce, as this Court has held, so must be the business of insurance. The unsoundness of any doctrine which would treat the lottery ticket but not the insurance business as in commerce would seem too plain for argument.[53]

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[53] Commentators have regarded the *Lottery* case as inconsistent with the insurance cases. James M. Beck, *The Federal Regulation of Life Insurance*, 181 North American Review 191, 199–200 (1905); S. Huebner, *Federal Supervision and Regulation of Insurance*, 26 Annals, American Academy of Political and Social Sciences, 681, 700–701 (1905); Frederick H. Cooke, *The Commerce Clause of the Federal Constitution*, 13 (1908); cf. 2, W. W. Willoughby, *The Constitutional Law of the United States* (1910 ed.), Sec. 296.

The *American Medical* case involved an enterprise even more closely akin to the insurance business. Members of Group Health Association periodically paid sums fixed by contract, in return for which they were to receive medical service and care when needed. This service was not a commodity; it was even more intangible than the payments of money received by a policyholder from an insurance company. And whether and to what extent the service was to be received depended upon the same type of contingency, *i. e.*, ill health, as is often covered by insurance. Group Health was, therefore, a method of protecting against the risk of undue medical expense through group contributions. The Court held that the Group Health Association was "engaged in business or trade" (317 U. S., at 528) within the meaning of the Sherman Act. "Trade" is probably a narrower term than "commerce," and is unquestionably included within it. (See pp. 44, 49, *infra*.) If a form of group protection which is not tied into the business world to nearly the same extent as is fire insurance constitutes "trade," the business of fire insurance obviously belongs in the same category.[54]

[54] The fact that the *Medical Association* case arose in the District of Columbia and did not involve interstate transactions does not weaken its authority here. For the insurance cases do not hold that insurance is not interstate, as of course it is, but that it is not commerce at all (*New York*

The cases holding that the performance of servicing contracts and the sale of securities are in commerce also are inconsistent with the view that insurance is not commerce. A contract for the servicing of a power company is in substance one performed in large part through the sending of information and documents through the mails. (Cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 432.) A security is usually either an interest in property which itself often does not move in commerce, or a promise to pay which is as much a personal obligation as an insurance policy. The distribution of such pieces of paper is no more commercial than the insurance business. And yet the offering of an "investment contract" of speculative value and representing an interest in real property has been held to be in commerce within the meaning of the Securities Act. *Securities and Exchange Commis-*

Life Insurance Co. v. *Deer Lodge County*, 231 U. S., at 510). Section 3 of the Sherman Act refers to a "restraint of trade or commerce" in any Territory or the District of Columbia; if an enterprise within these areas constitutes trade or commerce within the meaning of this section, the same activity, when carried on across state lines, is interstate commerce. Compare *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, with *National Labor Relations Board* v. *White Swan Co.*, 118 F. (2d) 1002 (C. C. A. 4), certiorari denied, 314 U. S. 648, which holds an interstate laundry subject to the National Labor Relations Act. The intimation in the *Atlantic Cleaners* case that "trade" and "commerce" in Section 3 of the Act may have a different meaning than in Sections 1 and 2 cannot be supported.

sion v. *Joiner Leasing Corp.*, No. 24, decided November 22, 1943;[55] see also *United States* v. *General Motors Acceptance Corporation*, 121 F. (2d) 376, 402 (C. C. A. 7), certiorari denied, 314 U. S. 618, in which the court held that financing constituted an essential element in the sale of cars in interstate commerce.

Of special significance is *Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19, since it involved insurance itself. The question there was whether a tax on marine insurance policies was a tax on exports prohibited by Article 1, Section 9 of the Constitution. The Court held the tax invalid, on the ground that (p. 26):

> insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis.

The relationship between marine insurance and transportation by sea is not essentially different from that between fire insurance and commerce on land.[56] (See pp. 61–63, *infra*, and *German Al-*

[55] Other cases holding or tacitly assuming that securities are in commerce are *Frost and Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 433; *Securities and Exchange Commission* v. *Universal Service Association*, 106 F. (2d) 232 (C. C. A. 7), and cases cited in the *Joiner* opinion, footnote 10.

[56] Marine insurance has been held to come within the doctrine that insurance is not commerce (*Hooper* v. *California*, 155 U. S. 648).

liance Ins. Co. v. *Kansas*, 233 U. S. 389, 414.) Furthermore, the exportation of goods is itself commerce. If for purposes of a prohibitory constitutional provision insurance is an "integral part" of exportation, it can hardly be said that for regulatory purposes under the commerce clause insurance is neither a part of commerce nor directly related to it.

D. THE MEANING OF "COMMERCE" WHEN THE CONSTITUTION WAS ADOPTED

We have up to this point sought to demonstrate the inconsistency of the language in the insurance cases with other decisions of this Court. In considering whether insurance is commerce in the constitutional sense, however, we may also properly turn to what the framers of the Constitution meant when they used the word "commerce." Did "commerce" to them denote merely the selling of tangible commodities, or their transportation, or did it have a broader meaning? An examination of the usage of the period will demonstrate that at that time "commerce" was a word of widest import.

1. *General usage in the Eighteenth Century*

Thus the Oxford English Dictionary (1893 ed.), relying in large part upon eighteenth century references, notes that "commerce" meant (1) trading and the exchange of merchandise, "including the whole of the transactions, arrange-

ments, etc., therein involved," (2) "intercourse in the affairs of life; dealings," (3) "interchange (esp. of letters, ideas, etc.)," (4) "communication, means of free intercourse." The illustrations given show that the word "commerce" was used to describe all kinds of dealings or intercourse. Dictionaries of the period gave among the synonyms for "commerce," "intercourse," "society," "correspondence," "conversation."[11] As the learned writers who have recently unearthed this material have stated (Walton H. Hamilton and Douglass Adair, *The Power to Govern* (1937), p. 207):

> It is obvious that when Chief Justice Marshall asserted that "Commerce," as written in the Constitution, "undoubtedly is traffic, but it is something more—it is intercourse" (*Gibbons* v. *Ogden*, 9 Wheat. 1), he was not giving an abstract concept a push in the direction his judgment convinced him was desirable. He was merely stating a usage that had been set down in the lexicons for over a century.

And we may add that the more recent decisions of this Court (pp. 17–19, *supra*) holding that all

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[11] Kersey, *Dictionarium Anglo-Britannicum:* Or, *A General English Dictionary* (1708); Martin, *Lingua Britannica Reformata:* Or, *A New Universal English Dictionary* (1754); Johnson, *A Dictionary of the English Language* (1755); Dyche, *A New General English Dictionary* (1761); Barclay, *A Complete and Universal Dictionary* (1774).

dealings between the states, whether or not commercial in the strictest sense, come within the commerce power also have clear justification in the usage of the eighteenth century.

The eighteenth century employed the words "trade," "traffic," and "commerce" to "describe the seamless web of activities by which commodities are fashioned for use, men earn their livings, and nations acquire wealth" (*id.*, p. 53). "Commerce" was the broadest and the most elegant of these terms and was plainly the most suitable for use in a constitution. It included, as we have shown, not only the bartering and selling of wares and all the arrangements pertaining thereto, but also dealings, intercourse, communication, and conversation. It is impossible within the limitations of a brief to give an adequate exposition of the eighteenth century usage of the term.[28] Perhaps, in view of the sweeping and substantially contemporaneous definitions in *Gibbons* v. *Ogden, supra,* pp. 35–36, this is unnecessary. We can do no better than refer in summary to the conclusions of Professor Hamilton and Mr. Adair (pp. 62–63):

> It is all but impossible in our own age to sense fully its eighteenth-century meaning. The Eighteenth Century did not separate by artificial lines aspects of a culture

[28] We respectfully refer the Court to the entire volume written on this subject by Professor Hamilton and Mr. Adair, *The Power to Govern.*

> which are inseparable. It had no lexicon of legalisms extracted from the law reports in which judicial usage lies in a world apart from the ordinary affairs of life. Commerce was then more than we imply now by business or industry. It was a name for the economic order, the domain of political economy, the realm of a comprehensive public policy. It is a word which makes trades, activities and interests an instrument in the culture of a people. If trust was to be reposed in parchment, it was the only word which could catch up into a single comprehensive term all activities directly affecting the wealth of the nation.

To the eighteenth century, in brief, commerce meant at least the world of business, including industry and finance. This world undoubtedly included insurance.

2. *Usage by members of the Constitutional Convention*

That the framers of the Constitution gave commerce this broad signification, appears from the history of the commerce clause itself. There was no discussion in the Convention as to the meaning of the first two phrases of the commerce clause, which had been approved without dissent or debate. The history of the provision as to the Indians sheds light, however, upon the constitutional usage.

Under the Articles of Confederation Congress possessed the power to "regulat[e] the trade and manage all affairs with the Indians," with certain limitations (Article IX). In order that the new federal government might have the same power, Madison submitted to the Constitutional Convention, to be referred to the Committee on Detail, the power "to regulate *affairs* with the Indians as well within as without the limits of the U. States."[59] [Italics supplied.] This proposition was transmitted to the Committee.[60] The Committee had previously reported, and the Convention approved without discussion, the grant to the federal legislature of power "to regulate commerce with foreign nations, and among the several States."[61] The Committee subsequently recommended that to the commerce clause there should be added the phrase "and with the Indian tribes," and this amendment was adopted without discussion.[62]

It is hardly conceivable that the change in wording from "affairs" to "commerce" was regarded as giving Congress less power to deal with the Indians than had been granted by the inadequate

[59] See Madison's Debates, as reported in H. Doc. No. 398, 69th Cong., 1st Sess., entitled *Documents Illustrative of the Formation of the Union of the American States*, p. 563.

[60] *Ibid.*

[61] *Id.*, at 475, 482.

[62] *Id.*, at 660–661.

Articles of Confederation. Furthermore, the substitution without objection of "commerce" for "affairs," the word suggested by Madison, suggests that the members of the Convention regarded the two words as having a similar meaning, a usage which is in harmony with the dictionary definitions to which we have referred. It thus appears that the Convention intended the commerce clause to reach dealings or affairs of any sort with the Indians or among the several states.

Whether or not "commerce" had this broad a meaning, there can be no doubt that it extends to the affairs of the business world. (See pp. 44–45, *supra*.) That these included the instrumentalities by which business was financed and protected is clear.[43] It is of great significance that members of the Constitutional Convention regarded insurance itself as falling within the commercial field. Alexander Hamilton, in his famous opinion on the constitutionality of the Bank of the United States, rendered February 23, 1791, declared that it would "admit of little if any question" that the power to regulate commerce included "The Regulation of policies of insurance."[44] James Wilson, a

[43] Dictionaries of the time distinguished a "bank of earth" from a "bank, in commerce." (See Hamilton & Adair, *loc. cit., supra*, p. 208.)

[44] See 3 *Works of Alexander Hamilton* (Lodge ed.), pp. 202–203.

member of the Convention and subsequently of this Court, in writing of the law merchant, declared, "This system of law has been admitted to decide controversies concerning bills of exchange, policies of insurance, and other mercantile transactions, both where citizens of different states, and where citizens of the same state only, have been interested in the event."[45] And the opinions in *Gibbons* v. *Ogden*, from which we have already quoted (*supra*, pp. 35–36), were written by contemporaries of the framers of the Constitution who used language in the same sense.

E. THE PRESENT MEANING OF COMMERCE

We believe that we have demonstrated that the domain of commerce, during the Constitutional period, was understood to be at least that of the business or mercantile world.[46] The opinions of this Court adopt the same view. The meaning of commerce is "determinable by the usages of the commercial world" (*Bowman* v. *Chicago & N. W. Railway Co.*, 125 U. S. 465, 501). "Commerce among the states is not a technical legal conception, but a practical one, drawn from

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[45] I *The Works of James Wilson* (Edited by James DeWitt Andrews), 1896, p. 335.

[46] That "commerce" refers to the entire business and financial community is indicated by many of its usages even at the present time. The phrases "commercial geography," "commercialize" and "commercial law" speak with overtones which embrace the whole industrial and financial economy.

the course of business" (*Swift & Co.* v. *United States*, 196 U. S. 375, 398; *Stafford* v. *Wallace*, 258 U. S. 495. Cf. *Wickard* v. *Filburn*, 317 U. S. 111, 122). "For more than a century it has been judicially recognized that in a broad sense it [commerce] embraces every phase of commercial *and business* activity and intercourse." [Italics supplied.] *Jordan* v. *Tashiro*, 278 U. S. 123, 127–128. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 436, quotes with approval Mr. Justice Story's definition of "trade":"

> • • • In the first place, the word "trade" is often and, indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade. • • •

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[11] *The Schooner Nymph*, 18 Fed. Cas. No. 10388. The term "trade," which is employed in the Sherman Act along with "commerce," is either synonymous with or narrower than "commerce." This was recognized in many early Sherman Act cases (*United States* v. *Patterson*, 55 Fed. 605, 639 (C. C. D. Mass.); *In re Grand Jury*, 62 Fed. 840, 841 (N. D. Cal.); *United States* v. *Debs*, 64 Fed. 724, 749 (C. C. N. D. Ill.); *United States* v. *Cassidy*, 67 Fed. 698, 705 (N. D. Cal.); *United States* v. *Coal Dealers' Assn.*, 85 Fed. 252, 265 (N. D. Cal.); see, also, *State of California* v. *Tagami*, 195 Cal. 522, 528–529; *Spence* v. *Johnston*, 142 Ga. 267, 271. Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189).

In the *Thames & Mersey* case, quoted *supra*, p. 41, the words "commerce" and "business" are used interchangeably in the same sentence.

The usage of recent years, as well as that of the past, shows that insurance is a part of the business, and hence the commercial, world. This appears not only from the understanding manifested outside the United States Reports, but also from the vocabulary of this Court in other cases than those following *Paul* v. *Virginia*.

1. *The usage in the business and legal worlds generally*

In 1905 the Chairman of the Committee on Insurance Law of the American Bar Association, in answer to inquiries, received letters setting forth English views of the subject from the distinguished jurist, Sir Frederick Pollock, and Mr. Charles Mylne Barker, President of the Incorporated Law Society of London.[68] Their replies are most pertinent. Sir Frederick's letter stated:

> In answer to your question of October 26th, marine insurance has undoubtedly always been held for part of the law merchant. (See *Malines Lex Mercatoria*, part I, chaps. 24, 25.) And this being so, it would seem difficult to maintain that other kinds of insurance are not, for it is com-

[68] American Bar Association Committee on Insurance Law, Report (1906), 29 *American Bar Association Reports*, 558.

> mon learning in our modern law that the same general principles govern them all. "Commerce" is not a word of art in common law nor frequent in English statutes, and I do not know of any judicial interpretation of it in English jurisdiction. It would seem, however, to include at all events the subject matters of the law merchant.

Mr. Barker's letter reviewed the pertinent English experience and usage, and concluded:

> I think, therefore, that in England from the time of Elizabeth to the present day insurance has been regarded as a branch of commerce.

The report of the Bar Association Committee [69] also states the results of a questionnaire sent in 1905 by Senator Dryden (President of the Prudential Insurance Company) "to some eight thousand associations and individuals throughout the United States. Included in this number was the entire membership of the American Bar Association." 71.1 percent of the replies answered in the affirmative the question:

> As a matter of personal opinion, do you hold the business of insurance to be commerce, or an integral and indispensable element of commerce, in the sense in which this term is used in everyday language?

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[69] *Id.*, at 550.

We think it of considerable significance that thirty-seven years after this Court's first pronouncement on the subject, a large majority of those polled were willing to state that the Court's reasoning was contrary "to the sense in which 'commerce' is used in everyday language." On the basis of this and a great deal of other historical material, the Committee of the Bar Association concluded that "*Paul* vs. *Virginia,* and the cases based upon it, involve a fundamental error in their repudiation of the usage and practice of the commercial world," and that "History and universal usage therefore sustain the claim that insurance is commerce." [70]

Many other commentators were of the same opinion.[71] We shall quote only from a few.

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[70] *Id.*, at 557.

[71] The expressions critical of this Court's reasoning in the insurance cases are well epitomized in two statements, one written in 1905 and one in 1932. In *Federal Control of Insurance*, 39 American Law Review 182 (1905), Professor Maxey, of the West Virginia University Law Department, aptly stated:

"* * * Practically every man who thinks of the insurance business as it exists today, thinks of it as one form of commercial activity, thinks of its relations as commercial relations. This is true of the jurist as well as the business man, unless, perchance, the former has read *Paul* v. *Virginia*."

And Professor Bernard C. Gavit commented in *The Commerce Clause of the United States Constitution* (1932), p. 134:

"* * * The expression 'Insurance is not commerce' has become almost a classic. There is nothing more to be said for it."

See also, in addition to the authorities cited in the text: George F. Seward, President, The Fidelity and Casualty

Senator Dryden, in an address in which he re-

Company of New York, *Insurance is Commerce* (1910); James M. Beck, *The Federal Regulation of Life Insurance*, 181 No. Am. Rev. (1905) 191; Reginald H. Innes (in 1900, of the Eng. Bar; 1935–40, Ch. Judge in Equity in New South Wales), *Insurance in its Relation to the Commerce Clause of the Federal Constitution*, 48 American Law Register, 717 (1900); Representative W. P. Hepburn, in *Organization and Law of the Department of Commerce and Labor*, Washington, D. C. (1904), 579; Henry E. Hess, Manager, New York Fire Insurance Exchange, *An Argument for Insurance as Commerce and for National Supervision*, paper read before Insurance Section of International Congress of Arts and Sciences, St. Louis, Mo., Sept. 19–25, 1904; A. J. Vorys, President, National Association of State Insurance Commissioners, see Max Cohen, *New Conditions Demand New Remedies*, 1 Moody's Magazine (1905–06), 302 n.; Sylvester C. Dunham, President, Travelers Insurance Co., *Amend the Constitution, if Necessary to Obtain Supervision*, 1 Moody's Magazine (1905–06), 291, 293; Nat Tyler, *Federal Supervision in Interest of Policyholders*, 1 Moody's Magazine (1905–06), 305, 307; David K. Watson, *The Constitution of the United States* (1910), 520, 521; Walter H. Bennett, Secretary-Counsel of National Association of Insurance Agents, 300 Weekly Underwriter (1934), 27, The Eastern Underwriter, Sept. 28, 1934, 20, 24; John W. Walsh, *National Supervision of Insurance and Paul* v. *Virginia*, 38 American Law Review (1904), 181, 187, *National Regulation of Insurance*, 30 National Corporation Reporter (1905), 434–435; R. A. M'Curdy, 27 Insurance News (1905), 4; Darwin P. Kingsley, President, New York Life Insurance Company, *Insurance Supervision and National Ideals*, 189 North American Review (1909) 481, 492–496; G. F. Michelbacher, *Casualty Insurance Principles*, 2nd ed. (1942) 121–122; L. G. Fouse, President, Fidelity Mutual Life Insurance Co., *State Regulation of Insurance*, 24 Annals, American Academy of Political and Social Sciences (1904) 69, 70, 80–82.

viewed earlier authorities on the subject,[72] concluded:

> * * * I believe all America today understands the word "commerce" to comprehend insurance * * *.

Henry Evans, President of the Continental Insurance Company, the Fidelity-Phoenix Fire Insurance Company, and the American Eagle Fire Insurance Company (all appellees here), testified on marine insurance before a House Subcommittee (Hearings, House Subcommittee on the Merchant Marine and Fisheries (66th Cong., 1st Sess., 1919), p. 283), as follows:

> Mr. EVANS. I think insurance is commerce.
>
> Mr. HEDGE. In spite of the Supreme Court?
>
> Mr. EVANS. The Supreme Court has ruled the other way. But today a cotton buyer

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Contra: William R. Vance, *Federal Control of Insurance Corporations*, 17 Green Bag (1905), 89; Harold C. Havighurst, 143 Weekly Underwriter (1940) 1485; George J. Benson, *Federal Control of Insurance*, 6 The Brief (1906) 116, 121–122; Arthur P. Will, *Federal Regulation of Insurance*, 66 Central Law Journal (1908) 49, 53, 54, 55; Samuel Bosworth Smith, *Shall We Have State or Federal Supervision?*, 13 The American Lawyer (1905) 372, 374, 376; Carman F. Randolph, *Federal Supervision of Insurance*, 5 Columbia Law Review (1905) 500, 513–516, 517; S. F. Wolfe, *State Supervision of Insurance Companies*, 26 Annals, American Academy of Political and Social Sciences (1905), 146–152.

[72] Address delivered before the Boston Life Underwriters Association on November 22, 1904, entitled *The Regulation of Insurance by Congress.*

> in Texas, for instance, a part of his contract is to deliver his cotton in Liverpool, and to cover the insurance. Now, the insurance is a part of that contract, and I believe if the matter came before the Supreme Court, if you could properly frame up such a case, that they would change their ruling.

The statements of many other insurance executives can be cited to the same effect.[73] These views have not been limited, however, to persons associated with insurance companies, whose opinions might be deemed colored by their distaste for burdensome state regulations.

Miles M. Dawson, Actuary, New York Legislative Committee, stated in an article entitled "A Case for National Supervision," 1 Moody's Magazine (1905–1906) 312, 314:

> The fact now appears to be that insurance is one of the most important commercial enterprises in the world, and a more vital part of the commercial structure than many other handmaids of commerce which might be mentioned that have received recognition long ago.

S. S. Huebner, Instructor of Insurance and Commerce, University of Pennsylvania, and later an expert in insurance to the U. S. Shipping Board and the Committee on the Merchant Ma-

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[73] See Seward, Hess, Dunham, Bennett, Kingsley, and Fouse, cited in note 71, *supra*.

rine and Fisheries, stated in his article *Federal Supervision and Regulation of Insurance,* 26 Annals, American Academy of Political and Social Sciences (1905), 681, 701, 703:

> It requires little argument to prove that insurance fundamentally underlies all business, and that it is inseparably interwoven with our whole commercial life. * * * in the case of fire insurance, the usefulness of the business to trade and industry can scarcely be comprehended. * * *
>
> * * * * * *
>
> In general, then, insurance in its various forms turns out to be the foundation of credit, and the protector of all commerce, rather than the mere incident of commerce that the Supreme Court has declared it to be.

In his treatise *The Commerce Clause of the United States Constitution* (1932) Professor Bernard C. Gavit wrote (pp. 333–334):

> "Commerce" includes more even than "business." The insurance business is certainly "commerce." * * *

In an excellent article on the effect of the commerce clause in the absence of federal legislation (Shenton, *Interstate Commerce During the Silence of Congress,* 23 Dickinson Law Review 78, 107, 139 (1918–1919),[74] the author comments upon the holdings in *Nathan* v. *Louisiana,* 8 How. 73, and

[74] The article is reprinted in 3 Selected Essays on Constitutional Law (Association of American Law Schools), 840, 865.

the insurance cases that buying and selling bills of exchange and issuing policies of insurance are not commerce. These decisions, he states—

> * * * ring strangely. The fact is that dealing in bills of exchange and issuing policies of insurance are commonly understood to be commercial pursuits. The uniform law which codifies the law of bills and notes throughout most of the country is known as one of the Uniform Commercial Acts. * * * Life insurance and fire insurance on a house are perhaps not so clearly commerce as the insurance of a marine cargo, yet every insurance contract contemplates the transmission of a policy and money, a transmission which is quite frequently from one state to another. A broker who dealt in foreign bills of exchange was said not to be engaged in commerce, but in "supplying an instrument of commerce." Why should the business of supplying the instruments of commerce be beyond the reach of a power to regulate commerce? * * *

In 1908, in a treatise on *The Commerce Clause of the Federal Constitution,* Frederick H. Cooke declared that (p. 13):

> Contracts of insurance between persons situate at the time in different states * * * seem literally "intercourse," and it seems difficult to discover any satisfactory reason for excluding such con-

tracts from the operation of the commerce clause.[75]

2. *The usage of this Court*

Except in cases in which it was concerned with the argument that state taxes on and regulations of insurance contravened the commerce clause, this Court has referred to insurance in a way which indicates clearly that it is regarded as a part of commerce.

In the first place the Court has almost invariably referred to the activities of insurance companies as "business." (E. g., *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307, 316; *German Al-*

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[75] A practical recognition of the integration of insurance with commerce in ordinary understanding may be found in the practice of "Chambers of Commerce." Such Chambers, as is well known, include within their membership insurance men and bankers along with other business men. The United States Chamber of Commerce, for example, has a Department of Insurance, and its board of directors includes a substantial number of insurance executives. See the pamphlet issued by the Chamber of Commerce entitled *The Chamber of Commerce of the United States—Its Organization, Functions and Services* (June 27, 1938), and the annual pamphlets published by the Chamber of Commerce of the United States in Washington entitled *Who's Who on the Board*. The latter pamphlet for the year 1942–1943 states in its introduction (p. 1):

> *Nine major divisions of business* are represented in the Board: Agriculture, Construction and Civil Development, Domestic Distribution, Finance, Foreign Commerce, *Insurance*, Manufacture, Natural Resources, and Transportation and Communication. [Italics supplied.]

See to the same effect the pamphlet for 1941–1942, p. 1.

liance Ins. Co. v. *Kansas*, 233 U. S. 389; *La Tourette* v. *McMaster*, 248 U. S. 465; *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 257; *Osborn* v. *Ozlin*, 310 U. S. 53; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313.) Indeed in the *Osborn* case (p. 66) the Court spoke of insurance as a type of business activity along with "warehouses, flour mills, and other business ventures," or the "business of banking," which are all unquestionably commercial. Inasmuch as the modern concept of "business" is included within the constitutional term "commerce" (pp. 44–45, 48–50, *supra*), the Court's inability to refer to insurance as anything but a business is itself a recognition of its commercial nature.

Moreover, there are cases in which the Court has described the insurance business as "commercial intercourse" and "trade."[76] *Insurance Co.* v. *Davis*, 95 U. S. 425, 429, related to the effect of an offer to pay premiums to a Southern agent of a New York insurance company during the Civil War. The premise upon which the Court predicated its discussion was "that war suspends all *commercial intercourse* between the citizens of two belligerent countries or states" [italics supplied]—a proposition which was assumed without question to apply to the payment

[76] The opinion of the Supreme Court of Kansas in *In re Pinckney*, 47 Kans. 89, 91–92, 27 Pac. 179 (1891), contains an enlightening discussion on this point.

of insurance premiums. The suspension of "intercourse" was said to prevent "any instructions, supervision, or knowledge of what takes place, on the one part, and any report or application for advice on the other." This description of the ordinary supervisory and reporting activities of the insurance business as intercourse brings them within Marshall's classical definition of commerce."

In *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 409, the Court was concerned with the validity under the Fourteenth Amendment of an Iowa statute prohibiting fire-insurance companies from combining or agreeing upon insurance rates. Without noting any difference between insurance and other types of business, the Court upheld the law on the authority of cases sustaining statutes "prohibiting combinations between possible rivals in trade."

In *Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19, discussed *supra*, p. 41, the Court declared that insurance was an integral part of exportation, which is itself commerce.

F. FIRE INSURANCE FALLS WITHIN THE FEDERAL COMMERCE POWER BECAUSE OF ITS EFFECT UPON INTERSTATE INDUSTRIES

We have sought to show that federal regulation of the fire insurance business is constitu-

[11] The indictment alleges that the appellees engaged in these activities (R. 9–10).

tional because the business as presently carried on is both commerce and interstate commerce. Even if this were not so, however, regulation of the business under the commerce clause would be lawful because of the close economic relation between fire insurance and activities which are unquestionably interstate.

The indictment alleges that (R. 9) "fire insurance coverage is essential to and directly affects the flow of interstate commerce." If we substitute "business" for commerce in the quoted sentence, this is substantially what this Court recognized in the *German Alliance* case when it said (233 U. S., at 414) that fire insurance "is practically a necessity to business activity and enterprise". (Cf. *Thames & Mersey Insurance Co.* v. *United States, supra*, p. 41.) This relationship is described in more detail in many authoritative sources.[78] It seems sufficient here to quote from one of them. The Report of the

[78] Francis C. Moore, *Fire Insurance and How to Build* (1903), 20; S. S. Huebner, *Property Insurance* (1922), 10–12; 14; R. F. Van Vranken, 36 Eastern Underwriter (1935) 23; Darwin P. Kingsley, *Insurance Supervision and National Ideals*, 189 North American Review (1909) 481; Robert Riegel and H. J. Loman, *Insurance Principles and Practices* (1929), 9; F. E. Wolfe, *Principles of Property Insurance* (1930), 2, 6–7; Albert H. Mowbray, *Insurance, Its Theory and Practice in the United States* (1937), 26, 27; W. F. Gephart, *Principles of Insurance*, Volume II: *Fire* (1917), 35–36; L. G. Fouse, *State Regulation of Insurance*, 24 Annals, American Academy of Political and Social Sciences (1904), 80–82.

American Bar Association Committee on Insurance Law entitled "Is Insurance Interstate Commerce?" states (28 American Bar Association Reports (1905) 498, 502–504):

> The development of the business of insurance has been concurrent and co-extensive with the development and expansion of all commerce, * * * * * * but for the system of insurance which has been developed within the last hundred years, commerce as we know it, credit as it is, civilization as we live it, would not have been possible.
>
> Fire insurance serves as a basis of credit. It is, in fact, collateral. None of the great manufacturing or commercial enterprises could be carried on in their present magnitude except for the confidence based upon insurance. The merchant desiring a line of credit from a manufacturer or wholesale dealer in a distant city is required to assure his creditor that the merchandise will be insured, not only while in transit, but after it has reached its destination. Insurance is a recognized asset, and the credit system of the country rests upon it as much as upon the financial responsibility of men and mercantile corporations. Bankers require their borrowers to carry fire insurance. * * *
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> * * * * * *

Hon. Wm. P. Hepburn, chairman of the House Committee on Interstate and For-

eign Commerce, at the hearing before that committee (p. 174) upon the bill which established the Department of Commerce and Labor, said:

"The power to insure a cargo or a vessel lessens the hazards of trade, and it has become so much the custom to rely upon that that it would undoubtedly be a wonderful impairment to the possibilities of commerce if the inability of men to insure should become a fixed fact; men would not undertake ventures that they now do if that were so."

In the debate on the same bill in Congress, January 17, 1903, Mr. Hepburn said: "* * * Now, it has come to pass that all commercial business is in a large measure dependent upon insurance. As I said the other day, if you were to obliterate the insurance of the United States you would well nigh obliterate the commerce of the United States. The business of commerce could not be undertaken were it not for the protection and influence of insurance." (Department of Commerce and Labor: Organization and Law, p. 589.)

Inasmuch as these facts are both alleged in the indictment and have been previously judicially noticed, further amplification seems unnecessary. In so far as the power of Congress is concerned, the relationship of fire insurance to interstate commerce does not differ materially from that of

bills of lading" as described by this Court in *United States* v. *Ferger*, 250 U. S. 199, 204–205, as follows:

> That as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in domestic and foreign exchange, is also so certain and well known that we may notice it without proof.

The Court there sustained the federal power to punish those who forged interstate bills of lading because of the effect of spurious bills upon "the credit and confidence which sustains interstate commerce" (p. 205). The credit which sustains the flow of goods in interstate commerce is also, as has been demonstrated, dependent upon fire insurance. A producer or shipper who could not obtain insurance would be unable to secure the credit on which the life of his business depends.

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[19] *Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19, held that an insurance policy was as essential to exportation as a bill of lading.

The reasoning of *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624, 626 (C. C. A. 9th), certiorari denied, 318 U. S. 791, 792, with respect to banks also applies to fire insurance:

> The nature and extent of the facilities afforded by a banking institution of the size and spread of respondent are too well known to warrant further exploration of the findings. That respondent's activities lend vital support to the commercial life of the nation is of course beyond debate. The impact upon commerce of the partial or complete cessation of its banking operations would be felt immediately throughout the country, and indeed the world. Shipments of merchandise and manufactured wares covered by bills drawn for the acceptance of respondent would be halted; and similar results would follow upon a cessation of its other credit activities. It is immaterial that substitute service might be obtained elsewhere, *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 326, 60 S. Ct. 918, 84 L. Ed. 1226. The dependence of commerce upon the continuity of credit furnished by these great banking institutions is as marked as was its dependence upon the electric energy furnished by the intrastate utilities involved in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126. While credit services, considered as

aids to commerce, may be less tangible than is electric current, for present purposes the differences would appear to be immaterial.

That Congress has the power under the commerce clause to regulate any instrumentality so essential to commerce cannot be doubted.[80] Congress thus has authority to see that the persons engaged in interstate commerce who need fire insurance are not deprived of and are not required to pay excessive amounts for it.

An appropriate means of attaining this legitimate federal objective is to prevent combinations of insurance companies from refusing to furnish insurance to persons who failed to deal with them exclusively, or from agreeing to eliminate all rate competition. This is the conduct with which appellees are charged—and it is precisely the type of conduct which the Sherman Act has been held to forbid when interstate commerce is restrained or monopolized, irrespective of whether the defendants are themselves engaged in such commerce. (E. g., *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Patten*, 226 U. S. 525; *Swift & Co.* v. *United States*, 196 U. S. 375; *Coronado Coal Co.* v. *United Mine Workers*,

[80] See in addition to the cases cited in the text, *United States* v. *General Motors Acceptance Corporation*, 121 F. (2d) 376 (C. C. A. 7), certiorari denied, 314 U. S. 618 (holding subject to the Sherman Act a restraint upon automobile financing); *United States* v. *Patten*, 226 U. S. 525; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. For general principles see *United States* v. *Darby*, 312 U. S. 100; *Wickard* v. *Filburn*, 317 U. S. 111.

268 U. S. 295; *Local 167* v. *United States*, 291 U. S. 293; *United States* v. *General Motors Acceptance Corporation*, 121 F. (2d) 376 (C. C. A. 7), certiorari denied, 314 U. S. 618; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 484–485; see *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 120.).

We think it clear that the federal government possesses the power to prohibit the activities complained of here. In Point II, immediately following, we shall show that in the Sherman Act it has exercised this power.

G. THE INSURANCE INDUSTRY SHOULD BE SUBJECT TO FEDERAL REGULATORY POWER

The problem as to federal power over the insurance business may be approached more broadly. The record confirms what is commonly known, that the insurance business is a great national industry in every sense of the word. The individual companies operate in a great many States. Moreover, local organizations having been found inadequate,[81] the fire insurance companies have themselves united in national [82] and large re-

[81] A. F. Dean, *The Philosophy of Fire Insurance* (Chicago, 1925), Vol. I, 23; William Hamlin Wandel, *The Control of Competition in Fire Insurance* (1925), ch. 3; Prentiss B. Reed, *Fire Insurance Underwriting* (New York, 1940), 352–353.

[82] *E. g.*, the Interstate Underwriters Board; the National Board of Fire Underwriters. The companies belonging to these associations are listed in *Best's Insurance Reports—Fire and Marine*, 1942, pp. 1082–1085.

gional associations,"[83] not merely for informational and social purposes but in order to control and dominate the activities of the industry.[84] The premium income in the United States in 1941 of the appellees alone was $886,764,876, of which $109,721,309 was derived from the home state.[85] The premium income of life insurance companies in 1941 amounted to four billion dollars, and the total assets of such companies were nearly 33 billion dollars.[86] The operations of these companies are carried out almost entirely through the channels of interstate commerce. Each company has a central office from which it supervises its manifold activities, and to and from which flow the vast sums with which business is carried on.

Argument should not be necessary to show that a nation-wide industry of this magnitude, operating across state lines, falls within the scope of the national commerce power. Indeed, from the time of Marshall, this Court has recognized that the fundamental purpose of the commerce clause was to permit regulation by the national authority of the "commerce which concerns more states than

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[83] The country is divided into four regions, the Eastern, Southeastern, Western, and Pacific, each of which has its controlling association. Membership in these associations is shown in *Best's Insurance Reports, loc. cit. supra.*

[84] *E. g.*, activities of the Southeastern Underwriters Association described in the indictment.

[85] See the table printed in Appendix, *infra*, compiled from *Best's Insurance Reports.*

[86] *Statistical Abstract of the United States*, 1942, p. 337.

one * * * and [of] those internal concerns which affect the states generally." Indisputably, this characterization fits the insurance industry.[87]

II

The Insurance Business Is Subject to the Sherman Act

The Sherman Act forbids "Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States" (Section 1), and any attempt to monopolize any part of such "trade or commerce" (Section 2). The indictment alleges restraints of the types commonly held to violate the Act—price-fixing, boycotts of agents and persons refusing to deal exclusively with the appellees, and monopolization. In Point I we have argued that the insurance business conducted by appellees is itself interstate commerce in the constitutional sense. If this is so, appellees' conduct comes within the

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[87] *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195. The quoted passage from *Gibbons* v. *Ogden* was repeated or restated in *Mayor of New York* v. *Miln*, 11 Pet. 102, 146, in 1837; *The Daniel Ball*, 10 Wall. 557, 564, in 1870; *Kidd* v. *Pearson*, 128 U. S. 1, 17, in 1888; *Champion* v. *Ames*, 188 U. S. 321, 346, in 1903; the *Employers' Liability Cases*, 207 U. S. 463, 493, 507, in 1908; and *The Minnesota Rate Cases*, 230 U. S. 352, 398, in 1913. Although "differences have arisen in" the application of these principles "to the complicated affairs" of the nation, they have "never [been] doubted" and universally approved" (*Employers' Liability Cases*, *supra*, Mr. Justice Moody dissenting, at 507).

Sherman Act unless "commerce," as used in that statute, was intended to have a narrower meaning than in the Constitution. We have also shown that fire insurance is vitally related to transactions in other industries which are unquestionably interstate commerce, and that the activities charged to appellees would restrain such commerce. (See pp. 60–67, *supra*.) If this conclusion is correct, appellees' conduct comes within the Sherman Act unless a special exception is to be read into it for restraints caused by insurance companies.

A. THE LANGUAGE OF THE ACT

The conduct charged to appellees is undoubtedly a restraint upon the business of selling fire insurance. If the operations of the fire insurance companies are commerce,[88] as shown in Point I, the facts alleged fall within the terms of the Sherman Act.

In *American Medical Association* v. *United States*, 317 U. S. 519, the Court held that a cooperative activity providing medical service and hospitalization on a "risk-sharing basis" was a business or trade within the meaning of the Act. The enterprise involved, in substance insured its members against the costs of illness or injury.

[88] It has not been argued that if appellees are engaged in trade or commerce, the trade or commerce would not be "among the several states."

If such an enterprise is engaged in trade or commerce, the same must be true of a company operated for profit and engaged in the business of insuring others, including concerns and persons engaged in trade and commerce, against the danger of loss by fire.

We thus think it clear that the literal language of the Sherman Act reaches restraints upon the insurance business. The words of the statute should, of course, be given their natural effect unless it is definitely shown that Congress intended them to carry a different meaning.

B. THE WORDS "TRADE OR COMMERCE," AS USED IN THE SHERMAN ACT, WERE NOT INTENDED TO HAVE A NARROWER MEANING THAN IN THE CONSTITUTION

1. The words of the Constitution are "commerce among the several states." The language of the Sherman Act is the same, supplemented by the word "trade." This identity was, of course, not fortuitous. It is obvious on the face of the Act that Congress employed the constitutional phrase in order that the jurisdiction to be exercised under the Sherman Act would be coextensive with that open to the Federal government under the Constitution with respect to the types of restraint at which the Act was directed. Different language would have been employed if Congress had had a more limited intention.

This Court has stated explicitly that, in the "sense of preventing restraints on commercial

competition," Congress in the Sherman Act "exercised all the power it possessed" (*Apex Hoisery Co.* v. *Leader*, 310 U. S. 469, 495; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435).[*] And the many antitrust cases in which this Court has treated the question of jurisdiction under the Act as identical with the constitutional issue bear witness to a consistent assumption that Act and Constitution have the same scope. (E. g. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Northern Securities Corp.* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Patten*, 226 U. S. 525; *Coronado Coal* v. *United Mine Workers*, 268 U. S. 295; *Local 167* v. *United States*, 291 U. S. 293.) Indeed, when the validity of other statutes has been called into question, the Court has relied upon the antitrust cases as constitutional authorities (*National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, 38–40; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 120; *Wickard* v. *Filburn*, 317 U. S. 111, 122–123; *Stafford* v. *Wallace*, 258 U. S. 495, 517–518; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 35, 39).

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[*] In the early case of *United States* v. *Debs*, 64 Fed. 724, 749 (C. C. N. D. Ill.), Circuit Judge Woods stated: "The word 'commerce,' as used in this statute, as it seems to me, need not and should not be given a meaning more restricted than it has in the constitution."

The Court's treatment of the Sherman Act as going to the limits of the commerce power is fully supported by the Act's legislative history. The well-known objects of the law were to eliminate the "trusts" and "'combinations' of businesses *and of capital* organized and directed to control of the market by suppression of competition in the marketing of goods *and services,* the monopolistic tendency of which had become a matter of public concern." [Italics supplied.] *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 492–493. The Act prohibited *every* restraint on competition, adding the words "or commerce among the several states" as (*id.* p. 495) "the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, * * * so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce." It was not suggested that any combinations which could be reached under the commerce power were not to be; Congress was in no mood to temporize with monopoly of any sort.

Senator Sherman, in explaining his original bill on March 21, 1890,[86] declared that its purpose was (21 Cong. Rec. 2457):

[86] The bill finally passed was not Senator Sherman's but one largely drafted by Senator Edmunds, and explained to the Senate and House by him and by Representative Culberson, respectively, who are quoted in the text. (See *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 489, and authorities

> to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. * * *

On April 8, after the Senate Judiciary Committee had submitted the bill in substantially its present form, Senator George, who was one of its draftsmen,[21] stated (21 Cong. Rec. 3147):

> The bill has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress.

Representative Culberson, who was in charge of the bill in the House, stated on May 1, 1890 (21 Cong. Rec. 4091):

> Now, it is suggested that Congress ought to go further. It is very difficult to say how it could do so. It occupies now in this bill, or attempts to occupy, the sphere allotted to it in the regulation of commerce between the States. * * *

On June 11, the House Conferees submitted a report in which they stated (21 Cong. Rec. 5950):

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cited.) But although the original bill differed greatly from that finally passed, there was no difference in ultimate objectives or in the intention to use all of the constitutional power available.

[21] See Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 North American Review 801, 802 (1911).

> In the original bill [which was the one finally passed] two things were declared illegal: Contracts in restraint of interstate trade or commerce, and the monopolization of such trade.
>
> Its only object was the control of trusts, so called, so far as such combinations in their relation to interstate trade are within reach of Federal legislation.

On June 16, in discussing an amendment (which did not pass) proposed by the House, Senator Edmunds, who had reported the final bill out of the Judiciary Committee, stated (21 Cong. Rec. 6116):

> I think myself that this amendment of the House was wholly unnecessary, but the original bill as it passed the Senate was adequate to cover every case over which Congress had power, and broad enough to include every case of wrongdoing of any kind of that nature. * * *

On June 20, 1890, on the occasion of the final conference report to the House immediately prior to the passage of the present act, Representative Kerr of Iowa stated (21 Cong. Rec. 6313):[32]

> When this bill was before the House recently the gentleman from Texas [Mr. Culberson], in discussing its provisions, made the statement that the power given in this bill was an exercise of the entire power of

[32] See also the statement of Representative Enloe on the same page.

> the General Government over the subject of trusts, and that its provisions presented the matter in a shape to obtain the decisions of the courts, out of which we might gather the full extent of the power of the Government on that subject. • • •
>
> • • • • • •
>
> My opinion is that it will be the exercise of the entire power of the Government over the subject, except insofar as it applies to the Territories and the District of Columbia.

On the same day, the last speech on the floor of the House, immediately preceding the unanimous adoption of the bill by the House, was made by Representative Stewart, of Vermont. He said (21 Cong. Rec. 6314):

> • • • The provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress over this subject under the Constitution of the United States. • • •

2. It is clear, furthermore, not only that Congress intended the Sherman Act to exercise all of its commerce power over the subject regulated, but that it did not regard the terms of the Act as having an exact and unalterable significance. "• • • the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions" (*Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 359–360;

ugar Institute v. *United States*, 297 U. S. 533, 00; cf. *Apex Hosiery Co.* v. *Leader*, 310 U. S., t p. 489.) Senator Edmunds stated in the Sen- te that the Committee intended to (21 Cong. ec. 3148)):

> • • • leave it to the courts in the first instance to say how far they would carry it or its definitions as applicable to each particular case as it might arise.

n describing the work of the Committee in an rticle written some years later, he declared—[93]

> • • • after most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific description all the acts which should come within the meaning and purpose of the words *"trade" and "commerce"* or "trust," or the words "restraint" or "monopolize," by precise and all-inclusive definitions; and that these were truly matters for judicial consideration. [Italics supplied.]

. is to be noted that the jurisdictional terms rade" and "commerce" were among those de- berately left undefined. Other members of each use also showed their awareness that the pro- sed legislation was a mere statement of prin-

[93] Edmunds, *The Interstate Trust and Commerce Act of* , 194 North American Review 801, 813, quoted with ap- roval in the *Apex* case, 310 U. S., at 489.

ciple from which the courts would determine the scope of the Act."

"Senator Sherman said (21 Cong. Rec. 2460):

"I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as law makers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. * * *"

Senator Turpie declared (21 Cong. Rec. 2556):

"I apprehend there are very few of us of this generation who have the slightest conception what this domain, very extensive in its character, shall yet include or embrace. Congress has seen fit heretofore to enter this domain very partially, only upon one or two or at the most three lines, and then to go no very great distance. The progress made in it has been always and must be dual. The jurisdiction conferred on the United States courts, arising under the Constitution and laws of the United States, is not self-operative. It always requires the act of Congress in the first place and the judgment of the court in the second place to make any progress at all in that domain. Congress must take the initiative. We must take action upon the subject-matter, and *if our own jurisdiction in respect to such subject-matter is sustained by the courts the judicial jurisdiction in the courts is then sustained in respect to such subject-matter* and the methods by which it is to be adjudicated." [Italics supplied.]

Representative Cannon of Illinois stated (21 Cong. Rec. 4099):

"Gentlemen say that they do not know how the courts will construe the act. It is for us to enact the law and for courts to construe and enforce it. If we do our duty it is reasonable to believe that the co-ordinate branch of the Government will do its duty. * * * *"

Representative Kerr, in his explanation of the Act just before it was passed, said (21 Cong. Rec. 6313):

"* * * The gentleman from Texas [Mr. Culberson] very truly said that this was an unexplored field, that this

Inasmuch as Congress intended the Court to determine the meaning of "trade" and "commerce," in an act whose "adaptability" was "comparable to that found to be desirable in constitutional provisions," it seems plain that Congress was not as a matter of legislative intention attempting to bind the Court to the tenets of its prior decisions, or to deprive it in this field alone of its frequently exercised privilege of changing its mind.[95]

Appellees argue, however, that the Court had, before 1890, declared that insurance was not commerce, and that the application of the Sherman Act must be regarded as frozen in the 1890 judicial mold. They refer, in particular, to the first portion of a statement by Senator Turpie in the debate on the Sherman Act. A fuller quotation

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was new legislation, that it was a case which demanded that the Government should declare the law, and that out of that declaration of the law would be evolved the decisions of the court, which would settle the question and determine the extent of our control over the subject. When the gentleman from Texas made that statement he had the approval, I believe, of every gentleman on this side of the House, and also of a number of gentlemen on the other side."

[95] See *Burnet* v. *Coronado Oil Co.*, 285 U. S. 393, 406–410 (dissent). As Mr. Justice Field, the author of *Paul* v. *Virginia*, himself stated (*Barden* v. *Northern Pacific R. Co.*, 154 U. S. 288, 322): "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."

is illuminating. The Senator said (21 Cong. Rec. 2556–2557):

> The Senator from Missouri [Mr. Vest] spoke the other day about the difficulty of defining the word "commerce," especially as contained in the phrase "interstate commerce." I recollect one judicial decision upon this subject very definitely. The Supreme Court has decided that insurance is not commerce, and I suppose by following the circle of negations long enough and excluding all the things not commerce we should come at last to the residuum, which must be commerce or interstate commerce, because it can be nothing else. *A fortiori*, judging from this principle, I should myself have decided that transportation is not commerce nor interstate commerce either. * * *

It appears that the Senator was aware of this Court's insurance decisions, but thought their reasoning equally applicable to show that transportation was not commerce. Such a grudging and critical recognition is far from a statement that Congress intended that the Sherman Act not reach insurance monopolies even if this Court should alter its views.

3. Our position that the Sherman Act left the courts with freedom to exercise their usual prerogative in determining whether or not to adhere to prior decisions is confirmed by the analogy of

cases concerning manufacturing. This Court had, prior to 1890, declared that manufacturing or production, like insurance, was not commerce or subject to the federal commerce power (*Veazie* v. *Moor,* 14 How. 568 (1852); *Lord* v. *Steamship Co.,* 102 U. S. 541 (1880); *Coe* v. *Errol,* 116 U. S. 517 (1886); *Kidd* v. *Pearson,* 128 U. S. 1 (1888).) The debates on the Sherman Act show that Congress was very conscious of these decisions, and particularly of the strong language in *Kidd* v. *Pearson,* which had been decided in 1888 (21 Cong. Rec. 1767–1769, 2465, 2467–8). Indeed, in the first case to reach this Court under the Sherman Act, *United States* v. *E. C. Knight Co.,* 156 U. S. 1 (1895), the Court held that a combination of manufacturers whose products moved in interstate commerce could not be reached under the commerce clause.

These two expressions, one shortly before and one after 1890, certainly manifested the Court's, and perhaps Congress', view of the scope of the commerce power when the Sherman Act was passed. But this has not deterred the Court from holding the Act applicable to combinations of producers, once the inadequacies of the constitutional reasoning of the earlier cases were recognized. (Cf. *Addyston Pipe and Steel Co.* v. *United States,* 175 U. S. 211; *Swift & Co.* v. *United States,* 196 U. S. 375; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 68–69; *United States* v. *Amer-*

ican Tobacco Co., 221 U. S. 106; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; *Bedford Cut Stone Co.* v. *Stone Cutters' Assn.*, 274 U. S. 37; cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 39–40, and cases cited; *Wickard* v. *Filburn*, 317 U. S. 111, 121–122.) On appellants' reasoning, the doctrine of *Kidd* v. *Pearson*, which like *Paul* v. *Virginia* involved the validity of a state police regulation, would have been frozen permanently into the Sherman Act.

C. THE HISTORY OF THE SHERMAN ACT SINCE 1890 DOES NOT JUSTIFY A RESTRICTIVE INTERPRETATION EXEMPTING THE INSURANCE INDUSTRY

Appellees argued below both that Congress in 1890 intended that the Sherman Act not apply to the insurance business and that its action, or inaction, since then, reflects a continuing intention to the same effect. We believe that we have shown that Congress did not mean its awareness of the Court's decisions prior to 1890 to have the effect of incorporating them by reference into the permanent content of the Sherman Act. The few pertinent occurrences since 1890 are entirely consistent with this view.

As a consequence of this Court's decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (1895), many members of Congress assumed that the Sherman Act had been rendered entirely ineffective as a means of destroying monopoly in

production or manufacture. In 1900 the House Committee on the Judiciary favorably reported a resolution to amend the Constitution so as to give Congress "power to define, regulate, prohibit, or dissolve trusts, monopolies, or combinations, whether existing in the form of a corporation or otherwise" (H. J. Res. No. 138, 56th Cong., 1st Sess.; H. Rept. No. 1501, 56th Cong., 1st Sess.). The Committee Report and the House debate (33 Cong. Rec. 6307–6328, 6335–6336, 6348–6349, 6396–6426), discussed the *Knight* decision at considerable length. The conclusion of Representative Ray, who submitted the Committee Report, was that (33 Cong. Rec. 6312):

> The constitutional power of Congress to regulate commerce among the several States does not give it any power to regulate or control manufacture or production, however much it affects or dominates that commerce.

The report and debate refer several times to state antitrust laws, two of which are said to apply exclusively to insurance companies. H. Rept. No. 1501, p. 9; 33 Cong. Rec. 6488. The amendment was opposed by the Democratic minority in part upon the ground that it would interfere with the power of the states to destroy monopoly. Representative Terry, for the minority, stated in this connection (33 Cong. Rec. 6319):

> Up to the present time the only legislation against trusts that has amounted to anything has been State legislation honestly enforced. Texas has brought the Waters-Pierce Oil Company monopoly to its knees. ***Missouri has brought the insurance trust to its knees,*** and under the laws of Ohio, had your party there but upheld the hands of Attorney-General Monett, the Standard Oil monopoly would have been driven from the State. [Italics supplied.]

The illustrative reference to oil and insurance as "trusts" is hardly consistent with appellees' suggestion that insurance is not the type of industry to which Congress could have intended an antitrust law to have applied.

The proposed amendment was not approved by the requisite two-thirds majority (33 Cong. Rec. 6426).[36] The House thereupon debated (33 Cong. Rec. 6476–6502) and passed (*id.*, 6502) by a vote of 274–1 a bill designed to strengthen the Sherman Act. At the next session, the Senate Judiciary Committee refused to report the measure, and a resolution to discharge it from consideration of the bill was debated (34 Cong. Rec. 2726–2734). Near the close of the debate, Senator Spooner, a member of the Committee stated (34 Cong. Rec. 2734):

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[36] The vote was 154 in favor, 132 against.

I am not willing to enact legislation here upon a subject which I believe to be unconstitutional and entirely ineffective for any party purpose.

Mr. CULLOM. Or any other.

Mr. SPOONER. Or any other. There is legislation upon the statute books. Our jurisdiction to deal with this question is derived from that clause of the Constitution which gives to Congress power to regulate commerce among the States, with Indian tribes, and with foreign countries. *So far as the power falls within the interstate-commerce clause, a law years ago was drawn which was intended to exhaust the Federal jurisdiction upon the subject.* I was a member of the Senate at the time. It was committed to the Judiciary Committee, a defective bill having been introduced by Mr. Sherman. Time was taken in that committee. Great lawyers were upon that committee who participated in the report. Senator Edmunds was its chairman. The distinguished Senator from Massachusetts [Mr. HOAR], than whom I know no greater lawyer, had to do with the drafting of the bill. Senator George, of Mississippi, who was a great lawyer, participated in that work. Senator Vest, of Missouri, a great lawyer and an apt legislator, also participated in that work. That bill was reported to the Senate, and it was intended to be so, and it was so, *drawn as to exhaust the Federal jurisdiction upon the subject;* and so far as the

> Supreme Court of the United States has had occasion to deal with it, it has so held, in my opinion. [Italics supplied.]

The motion to discharge was then defeated, 24–36 (34 Cong. Rec. 3438, 3439).

Here is a reaffirmation of the legislative understanding that the original antitrust law "was intended to exhaust the Federal jurisdiction on the subject." But the limits of that jurisdiction were apparently still thought to be those laid down in the *Kidd* and *Knight* cases.

During the administration of President Theodore Roosevelt special consideration was given to the possibility of Federal regulation of the insurance industry, though not in direct relation to the antitrust laws. In 1903, in the law creating the Department of Commerce and Labor, the Department was authorized, through the Bureau of Corporations, "to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States *as shall engage in interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance*" (32 Stat. 825, c. 552, § 6). [Italics supplied.] Even though this measure was limited to the gathering of information, on its face it suggests that Congress was of the view that insurance corporation were engaged in interstate commerce.

In 1904 and 1905, in his messages to Congress, President Roosevelt recommended:

> * * * that the Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance.
>
> Recent events have emphasized the importance of an early and exhaustive consideration of this question * * *.
>
> The Congress has already recognized that interstate insurance may be a proper subject for Federal legislation, for in creating the Bureau of Corporations it authorized it to publish and supply useful information concerning interstate corporations, "including corporations engaged in insurance." It is obvious that if the compilation of statistics be the limit of the Federal power it is wholly ineffective to regulate this form of commercial intercourse between the States, and as the insurance business has outgrown in magnitude the possibility of adequate State supervision, the Congress should carefully consider whether further legislation can be had.

As a result of these recommendations, the House Judiciary Committee in 1906 issued a report (H. Rep. No. 2491, 59th Cong., 1st Sess.) in which it concluded, after a lengthy analysis of this

Court's most confining opinions as to the scope of the commerce clause" (p. 25):

> First. That the commerce clause of the Constitution does not confer upon Congress the power to regulate or control the business of insurance.
>
> Second. That the Constitution does not confer upon Congress the power to regulate or control State corporations operating within the States except so far as they may be engaged in interstate commerce.

The constitutional reasoning of this report outside of the insurance field has since been repudiated by Congress and also by the Court. The latter has been true not only generally but in relation to the Sherman Act in particular.[98] We see no reason why the comments upon insurance should alone be entitled to greater sanctity.

We have been able to discover only one reference to insurance in the proceedings culminating in the passage of the Clayton Act. During the debate in the House, the following colloquy occurred (51 Cong. Rec. 9390):

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[97] The Report relies in large part upon *United States* v. *E. C. Knight Co.*, 156 U. S. 1, and *Kidd* v. *Pearson*, 128 U. S. 1. Strangely enough, the dissent in the *Lottery* case is cited (though not as a dissent), and the majority opinion in that case and *Swift & Co.* v. *United States*, 196 U. S. 375, and *Northern Securities Co.* v. *United States*, 193 U. S. 197, which had been decided in the preceding two years and which suggested a much broader view of the commerce power than the Committee was evidently prepared to accept, were not mentioned.

[98] See cases cited pp. 81–82, *supra*.

Mr. BARTON. We had an illustration recently where a big fire insurance company came into the State where local insurance companies have been doing business, not confined to the border of the State, and cut prices in that immediate locality until we had in three States 40 or 50 local companies put out of business, and then the price was put back where it was profitable to the company. Might not this same condition exist where we started a wholesale house in a State where their territory was confined to the State—might it not be a reduction of prices for putting that institution out of business?

Mr. WEBB. If the purpose is to wrongfully injure or destroy a competitor, this section will cover such practice; but insurance companies are not reached, as the Supreme Court has held that their contracts or policies are not interstate commerce.

Mr. BARTON. It is not right that they should come within the law?

Mr. WEBB. Yes.

This would seem to suggest that it was only the compulsion of this Court's decisions, rather than any intention on the part of Congress, which had prevented the antitrust laws from being applied to insurance.

In 1920, Congress incorporated in the Merchant Marine Act (41 Stat. 988) a clause designed to encourage the development of American marine

insurance companies through relaxation of the restrictions of the antitrust laws (41 Stat. 1000, 46 U. S. C., § 885). Section 29 of the Act provides that:

> Nothing contained in the "antitrust laws" * * * shall be construed as declaring illegal an association entered into by marine insurance companies *for the following purposes:* To transact a marine insurance and reinsurance business in the United States and in foreign countries and to reinsure or otherwise apportion among its membership the risks undertaken by such association or any of the component members. [Italics supplied.]

The implication in the italicized phrase that no complete exemption from the antitrust laws was intended [99] is confirmed by the Senate Committee Report (S. Rep. No. 573, 66th Cong., 2d sess., p. 9), which states, with respect to the exemption:

> *Under certain conditions* we relieve marine insurance associations or companies from the restrictions of the antitrust laws. We believe that the interests of our country are fully protected by the limitations placed upon these associations, and if we

[99] The Act permits the marine insurance companies to combine, but presumably would not allow them to compel competitors who were unwilling to join with them voluntarily to do so or go out of business. Thus, if appellees were marine insurance companies, the Act would not exempt from the Sherman Act the conduct ascribed to them in the indictment.

> can develop marine insurance as it should be developed in this country we can do nothing better for an American marine. Only about 10 percent of our hull insurance and only about 25 or 30 percent of all kinds of our marine insurance are done today by American companies. [Italics supplied.]

There was, of course, doubt as to whether the exemption was necessary, in view of the insurance cases. The attitude of the industry, and also of the Subcommittee of the House Committee on Merchant Marine and Fisheries, appears from the recommendations of the Subcommittee:[1]

> In addition to the foregoing, your committee believes that the Federal Government may be of further assistance in several respects, and desires to recommend the following:
>
> (1) That marine underwriters should be assured of the legality of combinations and associations designed to facilitate reinsurance or to extend underwriting activities to foreign countries. A surprisingly large number of underwriters expressed themselves to the committee as fearful of the legal consequences that might attach to the creation of such associations or combinations. To this end, it will be advisable, and even if unnecessary can do no harm, to free all such cooperative efforts from the pos-

[1] Printed with S. S. Huebner, *Report on Status of Marine Insurance in the United States*, Government Printing Office, 1920, p. 78.

sible operation of the Sherman and Clayton Antitrust Acts.

But the passage of the bill, together with the above remarks of the Senate Committee and House Subcommittee, strongly suggests that as of that time, thirty years after the passage of the Sherman Act, Congress did not regard itself as committed to the proposition that the antitrust laws could not apply to the insurance business. As this Court has indicated in an analogous situation, the enactment of a partial exemption from the Sherman Act recognizes "that to some extent not defined," the activities exempted "remain subject to it" (*Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 488).

Appellees argue that the failure of Congress to amend the Sherman Act so as to bring fire insurance within its purview shows a legislative intention that fire insurance be exempt. The specific exemption for marine insurance would seem to show that Congress understood that amendment was necessary to remove insurance from the Act's prohibitions rather than the contrary. But in any event the failure to amend obviously shows nothing. If the insurance business was not reached under the terms of the Act, this was only because of this Court's constitutional decisions, not because of any deficiencies in the Act's provisions. If the Court was prepared to depart from the language of the insurance cases insofar as

the exercise of federal power was concerned, the Sherman Act would apply to insurance, as it did to manufacturing in similar circumstances, without further amendment. If the Court adhered to the confining remarks in the insurance cases, amendment of the law would have been futile.

Appellees point to the failure of Congress to enact other bills, unrelated to the antitrust laws, designed to regulate the insurance industry. None of these bills reached the floor of either house, and they may have died for any number of reasons.[2] But even if it be assumed that the failure of Congress to proceed with such measures resulted from its knowledge of this Court's decisions, this would not prove that Congress intended to limit the scope of a statute previously passed which exercised its entire commerce power without restriction.

Appellees below also attempted to derive advantage from the failure of Congress to approve an anticombination provision in a bill proposed to regulate insurance companies in the District of Columbia. In 1900 the House Committee on the District of Columbia favorably reported a regula-

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[2] In their brief below appellees adverted specifically to H. R. 9629, 52d Cong., 1st Sess.; S. 2736, 55th Cong., 2d Sess.; and S. 7277, 58th Cong., 3d Sess. It has been suggested that the first two of these measures were rejected because of considerations not relevant to the issue here. See Senator John F. Dryden, an address on *The Regulation of Insurance by Congress* (delivered before the Boston Life Underwriters Association, November 22, 1904), pp. 22, 26.

tory bill containing no antitrust provision (H. R. 2283, 33 Cong. Rec. 3644–3646). Representative McRae offered an amendment, which he explained as follows (*Id.*, at 3652–3):

> If insurance companies are to be permitted to organize and do business in the District of Columbia under this, or even under existing laws, we ought to protect the people from the exorbitant rates charged by those companies, as stated by the gentleman from Iowa [Mr. Hepburn], and as known to every man who has made inquiry about it.
>
> As soon as an opportunity presents itself, I shall move this amendment, which I will ask the Clerk to read. It is a prohibition against any agreement on the part of insurance companies that do business within the District of Columbia to maintain what is commonly known as "board rates"—in other words, to abolish the *insurance trust* in the District of Columbia.
>
> * * * * *
>
> The purpose of that amendment is to prevent combinations on the part of the insurance companies to maintain exorbitant rates. It has been adopted in a great many States, and in all the States where it has been adopted it has proved a benefit to the people who seek insurance and who have to have it. [Italics supplied.]

The amendment was adopted without objection, and the bill passed as amended (*id.*, at 3655).

The entire bill apparently died in Senate Committee (see *id.*, 3667). Inasmuch as there had been objections in the House to other features of the bill (*id.*, 3647–55) but not to the one in question, it is not reasonable to attribute the failure of the measure to pass the Senate to the antitrust section. The debate shows, on the contrary, that in 1900 Congress regarded combinations of insurance companies as a "trust."

We have reviewed these expressions of legislative intention since 1890, in order to disprove appellees' contention that they manifest an affirmative intention on the part of Congress that the Sherman Act not apply to insurance. Some of the most significant of the occurrences to which we have referred point in the contrary direction. Inasmuch as, if the insurance business is in commerce, the activities of appellees plainly come within both the words of the statute and the legislative purpose to stamp out monopoly to the extent permitted by the federal commerce power, the burden is upon appellees definitely to prove that Congress did not intend the language of the act to be given its full meaning. This burden has not been sustained.

Appellees stress the fact that the Sherman Act has not in fifty years been applied to the insurance business, and urge that the absence of prosecutions or other cases manifests a general understanding that the Act was not applicable to in-

surance. The cases mainly relied upon are those in which the Court has refused as a matter of statutory construction to overturn prior constitutional decisions insofar as they had been embodied and recognized in legislative enactment (*Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244; *Helvering* v. *Griffiths*, 318 U. S. 371). But those cases do not suggest that a statute which uses language as broad as that of the Constitution must always be more narrowly construed to accord with prior judicial decisions no longer approved by the Court. Cf. the history of the Sherman Act itself, *supra*, pp. 81–82, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (affecting commerce); *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110. Only where an intention on the part of Congress to confine the Act in accordance with prior decisions plainly appears will the Court fail to give the words of such a statute their full meaning.

In the *Parker* and *Griffiths* cases the Court found not mere knowledge of its prior decisions, but an affirmative intention on the part of Congress that they be given effect in the particular statute. The Longshoremen and Harbor Workers Compensation Act, considered in the *Parker* case, was designed to fill a hiatus of undefined extent in workmen's compensation coverage left by *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; if the *Jensen* doctrine had been abandoned for purposes of that Act, the uncertainty which the Act was designed

to prevent would have been intensified, a result obviously not contemplated by Congress. And in the *Griffiths* case, the Congressional proceedings and debates contained specific statements which were regarded by the majority of the Court as indicating that the amended statute was not intended to be construed in a manner inconsistent with the prior decision in *Eisner* v. *Macomber*, 252 U. S. 189.

But there is nothing in the history of the Sherman Act to suggest that Congress wished its language not to be given the full scope of its constitutional counterpart. There was awareness of the doctrine of the insurance cases and of its probable effect upon the interpretation of the Sherman Act, but nothing more; indeed, in the political climate of the times, any intention to exempt the "insurance trust" (33 Cong. Rec. 3652, 6319), except under the compulsion of judicial decision, would have been remarkable. (See pp. 105–108, *infra*.)

Nor does the fact that for many years no antitrust cases were brought against insurance companies show that *Paul* v. *Virginia* was regarded by the Department of Justice as having been incorporated into the Sherman Act. The institution of suits would have been futile until there was reason to believe that the Court no longer would adhere to the pronouncement that "insurance is not commerce." The first definite indica-

tion to that effect was the restatement of the rule, in a manner entirely consistent with application of the Sherman Act to insurance, in *Western Livestock* v. *Bureau of Internal Revenue*, 303 U. S. 250, discussed *supra*, pp. 33–34, decided in 1938. The decision in the *American Medical Association* case, with respect to an enterprise similar to but not as commercial as the insurance business, also seemed to manifest a conception of "trade or commerce" incompatible with that contained in the insurance cases.[3] In addition, the Court's approach to problems as to the scope of the commerce power generally had become imbued with a sense of the earlier and broader scope of its coverage, which we believe had been departed from.[4] The failure to apply the Act to insurance under the compulsion of decisions clearly was not a voluntary administrative interpretation of the Act. (Cf. *Helvering* v. *Hallock*, 309 U. S. 106, 119–121.)

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[3] The final decision of this Court in the *Medical Association* case did not come until after the institution of the present suit. But the Court of Appeals for the District of Columbia had on two occasions held that the Sherman Act applied (110 F. (2d) 703, 130 F. (2d) 233), and this Court had denied certiorari from the first of these decisions (310 U. S. 644).

[4] Compare *Kidd* v. *Pearson*, 128 U. S. 1, *United States* v. *E. C. Knight Co.*, 156 U. S. 1, *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, *Mulford* v. *Smith*, 307 U. S. 38, *United States* v. *Darby*, 312 U. S. 100, and *Wickard* v. *Filburn*, 317 U. S. 111.

United States v. *Cooper Corporation*, 312 U. S. 600, and *Federal Trade Commission* v. *Bunte Brothers*, 312 U. S. 349, upon which appellees rely, were of an entirely different character. Inaction on the part of the executive branch of the Government with respect to the problems presented in those cases was not pursuant to judicial compulsion. Indeed, in the *Bunte* case, the judicial decision most closely in point and suggesting a broader interpretation of the Federal Trade Commission Act (*The Shreveport Case*, 234 U. S. 342) was decided in 1914, shortly before the Act was passed. Moreover, a construction of that Act as only applying to transactions "in" interstate commerce was supported by its language. Thus, in neither of these cases was the administrative inaction the result of the coercion of judicial pronouncements.

The contrary is true here. The barrier to application of the Sherman Act to the insurance business has been erected by the judiciary, not the legislative nor the executive, and since it rests upon constitutional doctrine, only the judiciary can remove it.

D. THE ARGUMENT THAT AN EXEMPTION FOR INSURANCE COMPANIES SHOULD BE READ INTO THE SHERMAN ACT BECAUSE OF THE PECULIARITIES OF THE INSURANCE BUSINESS IS WITHOUT MERIT

Appellees have also argued that an exception should be read into the Sherman Act for insurance on the theory that free competition among

insurance companies is detrimental to the public interest. In meeting a similar argument, this Court declared with admirable foresight in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 351, 352:

> Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. * * *
>
> But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in

> prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. * * *

As the above case holds, it is for the legislature and not for the judiciary to determine whether competition or combination is the economic policy to be adopted. Both national and most state legislatures have enacted antitrust laws of general application and have provided by special statutes for those industries in which unlimited competition was thought to be undesirable.[5] These regula-

[5] Federal statutes containing provisions specifying the extent to which exemptions from the antitrust laws are granted include the following: Interstate Commerce Act, § 5 (15), 48 Stat. 219, 49 U. S. C., § 5 (15); Emergency Railroad Transportation Act of 1933, § 10 (a), 48 Stat. 215, 48 Stat. 1740, 49 Stat. 376, 49 U. S. C. § 260; Motor Carrier Act, § 213 (f), 49 Stat. 555, 557, 49 U. S. C. § 313; Webb Export Trade Act, §§ 1-5, 40 Stat. 516, 15 U. S. C. § 61–65; Shipping Act, 1916, §§ 1, 15, 39 Stat. 728, 733, 46 U. S. C. §§ 801, 814; Marine Insurance Association Act, § 29 (a) and (b), 41 Stat. 1000, 46 U. S. C. § 885; Capper-Volstead Act, §§ 1-2, 42 Stat, 388, 7 U. S. C. §§ 291, 292: Agricultural Adjustment Act of 1933, Agricultural Marketing Agreement Act of 1937, §§ 8b and 8d (1), 48 Stat. 31, 48 Stat. 528, 49 Stat. 753, 50 Stat. 246, 7 U. S. C., § 608b; Provisions of Agricultural Adjustment Act relating to Anti-Hog-Cholera Serum and Hog-Cholera Virus, §§ 56 and 57, 49 Stat. 781, 7 U. S. C. §§ 851–852; Bitu-

tory acts adopt other means of safeguarding the public interest against unregulated monopoly, and customarily do not grant total exemptions from the antitrust laws but only to the extent that particular conduct is administratively approved.

The argument that the competitive structure guaranteed by the Sherman Act would be harmful to the public interest has been advanced by other industries, as the above quotation from the *Northern Securities* case suggests. Public utilities are generally separately classified in large part for this very reason; the advantages of monopoly from the viewpoint of efficiency led to government supervision, and a *pro tanto* waiver of the antitrust laws. There can be no question, however, but that public utilities are subject to the Sherman Act in the absence of a specific exempting statute. This was settled in the second case to come before this Court under the Act (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897)), and has not been doubted since.*

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minous Coal Act of 1937, §§ 4 I (d) and 12, 50 Stat. 72, 15 U. S. C., §§ 832 (d), 842; National Industrial Recovery Act, § 5, 48 Stat. 198; Consolidations and Mergers of Telegraph Carriers—Public Law No. 4, 78th Congress, 1st Session, March 6, 1943 (amending Communications Act of 1934).

* *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Terminal Railroad Association*, 224 U. S. 383; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61; *United States* v. *Reading Company*, 253 U. S. 26; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

In the *Trans-Missouri Freight Association* case it was argued that the railroads which were charged with combining to fix rates were public utilities, that their nature was such that competition in rates was undesirable, that they were regulated under the Interstate Commerce Act, and that Congress did not intend the antitrust law to apply to them. In rejecting these contentions, the Court held that the Act must be construed in accordance with its language to reach all combinations and not merely the trusts which Congress had most directly in mind (166 U. S., at 319). The Court used language which exactly applies to this case, if the word "insurance" is used in place of "railroad" (pp. 321–325):

> It is also urged that there are evils arising from unrestricted competition in regard to railroads which do not exist in regard to any other kind of property, that it is so admitted by the latest and best writers on the subject, and that practical experience of the results of unrestricted competition among railroads tends directly to the same view; * * *. It is, therefore, claimed to be the duty of the court, in carrying out the rule of statutory construction, above stated, to restrict the meaning of these general words of the statute which would include railroads, because, from the considerations above mentioned, it is plain that Congress never intended that railroads should be included.

> Many of the foregoing assertions may be well founded, while at the same time the correctness of the conclusions sought to be drawn therefrom need not be conceded. * * * It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest.

A considerable number of the important cases under the Sherman Act have been brought against the railroads,[7] and it is clear that except to the extent specifically provided in the Interstate Commerce Act, they are subject to the antitrust law. It is unquestioned that other public utilities also come within the purview of the Sherman Act.[8]

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[7] See cases cited *supra*, note 6, p. 102, and *United States* v. *Pacific and Arctic Ry. Co.*, 228 U. S. 87; *United States* v. *New York, New Haven and Connecticut R. Co.* (S. D. N. Y. 1914) Eq. 11–301 (consent decree); *United States* v. *Nevada Northern Ry. Co.* (D. Nev. 1933) No. 8856 (pleas of *nolo contendere*); *United States* v. *Association of American Railroads*, 36 F. Supp. 225 (D. D. C. 1941) (consent decree); *United States* v. *Pullman Co.*, 50 Supp. 123 (E. D. Pa. 1943).

[8] *United States* v. *Northern Pacific Wharves and Trading Co.*, 4 Alaska 552 (1912); *United States* v. *Columbia Gas and Electric Co.*, 27 F. Supp. 116 (D. Del. 1935) (consent decree); *United States* v. *Great Lakes Steamship Co.* (N. D. Ohio 1928) No. 2456 (consent decree); *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 217 Fed. 656 (N. D. Ohio 1914); *United States* v. *American Tel. & Tel. Co.* (D. Ore. 1913) No. 6082 (consent decree); *United States* v. *Postal Tel. & Cable Co.* (S. D. N. Y. 1937) Eq. 86–128 (consent decree); *United States* v. *Freightways* (N. D. Cal. 1943) No. 22075–R (consent decree).

Insurance companies were no more immune than the railroads from the public hostility toward monopoly during the era in which the Sherman Act became law.[9] Between 1885 and 1912, twenty-three states enacted laws forbidding insurance combinations.[10] In seven of these states insur-

[9] See the congressional references to the "insurance trust" *supra*, pp. 84, 94.

[10] Twenty-two of these statutes were general prohibitions against the joint fixing of rates, while one (North Carolina) applied to other forms of joint activity: L. N. H. 1885, ch. 93, p. 289 [Rev. L. N. H. (1942), ch. 325, § 15]; L. Ohio 1885, No. 284, p. 231 [Throckmorton's Ohio Code Ann. (Baldwin, 1940), § 9563]; L. Mich. 1887, No. 285, p. 384 [Mich. Stat. Ann. (Henderson, 1937), § 24.99]; L. Kan. 1889, ch. 257, p. 389, and L. Kan. 1897, ch. 265, p. 481 [Gen. Stat. Kan. (Corrick, 1935), §§ 50–101, 50–112]; L. Ga. 1890–91, No. 745, p. 206 [Ga. Code Ann. (1937), § 56–219]; L. Maine 1893, ch. 285, p. 339 [repealed: L. Maine 1895, ch. 26, p. 24]; L. Mo. 1895–97, p. 237 [Mo. Rev. Stat. Ann. (1943), §§ 8302, 8304, 8307, 8311, and 8317]; L. Iowa 1896–97, ch. 22, p. 31 [Iowa Code (1939), § 9010]; L. Ala. 1896–97, No. 634, p. 1428 [repealed: Ala. Gen. Acts 1923, No. 359, p. 381]; L. Neb. 1897, ch. 79, p. 347; L. Neb. 1897, ch. 81, p. 354, L. Neb. 1913, ch. 154, p. 419 [Comp. Stat. Neb. (1929), §§ 44–321, 59–101, and 59–301]; L. Wis. 1897, ch. 356, p. 908 [Wis. Stat. (1941), § 203.23]; Acts Va. 1898, ch. 644, p. 683 [repealed: Acts Va. 1901–2, ch. 615, p. 729]; Acts S. C. 1902, No. 574, p. 1057 [Code S. C. (1942), § 6624, et seq.]; L. S. D. 1903, ch. 158, p. 183 [S. D. Code (1939), § 31.2310]; G. L. Tex. 1903, ch. 94, p. 119 [Vernon's Rev. Civ. Stat. (Tex., 1939), Art. 7426]; Ark. Acts 1905, No. 1, p. 1, as amended by Ark. Acts 1907, No. 184, p. 430 [Ark. Stat. (Pope, 1937), §§ 9407, 9408]; P. L. N. C. 1905, ch. 424, p. 429, and P. L. N. C. 1915, ch. 166, p. 243 [N. C. Code (Michie, 1939), § 6432]; Acts Tenn. 1905, ch. 479, p. 1019 [amended Pub. Acts Tenn. 1919, ch. 8, p. 32, and repealed by Pub. Acts Tenn. 1919, ch. 33, p. 82]; Miss. Code 1906, § 5002, adopted L. Miss. 1906, ch. 101, p. 78 [The

ance combinations were also held to violate the general antitrust law[11] and in three additional states were held subject to the common law doctrine as to restraint of trade.[12] In two states, Texas and Kentucky, the court held the general

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provisions relating to insurance rate agreements were retained through the 1927 Code but did not appear in the 1930 Code]; Gen. L. Ore. 1909, ch. 230, p. 399 [Ore. Comp. L. Ann. (1940), § 101–142]; Sess. L. Wash. 1911, ch. 49, p. 195, and Sess. L. Wash. 1915, ch. 97, p. 278 [Remington's Rev. Stat. Wash. (1932), § 7076]; L. Ariz. 1912, ch. 73, p. 354 [Ariz. Code Ann. (1939), § 74–101, et seq.]; Acts La. 1912, No. 224, p. 509 [La. Gen. Stat. (Dart, 1939), § 4173, et seq.]. See also L. N. D. 1925, ch. 153, p. 181 [N. D. Comp. L. (Supp. 1913–1925), § 4964a1] containing provisions against discrimination against agents, and against the practice of separation.

[11] *Firemen's Fund Insurance Co.* v. *Hellner*, 159 Ala. 447, 49 So. 297 (1909); *Hartford F. Insurance Co.* v. *State*, 76 Ark. 303, 89 S. W. 42 (1905); *Beechley* v. *Mulville*, 102 Iowa 602, 70 N. W. 107 (1897); *Re Pinckney*, 47 Kan. 89, 27 Pac. 179 (1891); *State* v. *Phipps*, 50 Kan. 609, 31 Pac. 1097 (1893); *Hartford F. Insurance Co.* v. *Raymond*, 70 Mich. 485, 38 N. W. 474 (1888); *Fire Insurance Cos.* v. *State*, 75 Miss. 24, 22 So. 99 (1897); *State ex rel. Crow* v. *Firemen's Fund Insurance Co.*, 152 Mo. 1, 52 S. W. 595 (1899); *State v. American Surety Co.*, 91 Neb. 22, 135 N. W. 365 (1912). See 21 A. L. R. 543.

[12] *People* v. *Aachen & M. F. Insurance Co.*, 126 Ill. App. 636 (1905); *McCarter* v. *Firemen's Insurance Co.*, 74 N. J. Eq. 372, 73 Atl. 80 (1909); *Metzger* v. *Cleveland & Adams*, 28 Ins. L. J. 176 (Ind. 1899) (quoted in 21 A. L. R. 544). *Contra: People ex rel. Pinckney* v. *New York Board of Fire Underwriters*, 7 Hun. 248 (N. Y. 1876); *Aetna Insurance Co.* v. *Commonwealth*, 106 Ky. 864, 51 S. W. 624 (1899); *Louisville Board Fire Underwriters* v. *Johnson*, 133 Ky. 797, 119 S. W. 153 (1909); *Booker & Kinnaird* v. *Louisville Board of Fire Underwriters*, 188 Ky. 771, 224 S. W. 451 (1920); *Harris* v. *Commonwealth*, 113 Va. 746, 73 S. E. 561 (1912). In

antitrust laws inapplicable to insurance,[13] but the Texas decision was overturned by specific legislation.[14] In sustaining the constitutionality of an Alabama anticombination law, this Court itself stated (*German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307, 316):

> * * * We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411.

Although this state legislation does not bear directly upon the construction of the Sherman

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Continental Insurance Co. v. *Board of Fire Underwriters of the Pacific*, 67 Fed. 310 (N. D. Cal., 1895), a suit brought under the common law to restrain a combination of fire insurance companies, Circuit Judge McKenna held that no cause of action was stated with respect to the companies' refusal to designate any agent who also represented the plaintiff company but that other conduct, including threats against agents and customers, was actionable.

[13] See the *Kentucky* cases cited in the preceding note and *Queen Insurance Co.* v. *State*, 86 Tex. 250, 24 S. W. 397 (1893). For a similar decision in recent years see *Brock* v. *Hardie*, 114 Fla. 670, 154 So. 690 (1934).

[14] See the Texas statute cited in note 10, *supra*.

Act, it significantly manifests the climate of opinion when the antitrust law was passed. A trust-busting Congress of that period, it can be assumed, would not have regarded insurance alone as an industry in which competition was so evil and undesirable as to warrant a special exemption from the antitrust law. Not until a later time were some of these antitrust laws superseded by legislation which authorized combinations of fire insurance companies.[15] But it is the period around 1890 with which we are concerned.

Appellees contend that the uneconomic nature of competition in the fire-insurance industry is so axiomatic that fire insurance could not have been intended to be included under the provisions of the Sherman Act. We have already suggested that this was not the view of the representatives of the people in 1890 when the Sherman Act was passed. It is our purpose here to show that the arguments advanced by the appellees and the writers cited by them in the brief below do not prove that it would be unreasonable to subject the fire-insurance industry to the antitrust laws.

1. It is claimed that there is no place for competition in the fixing of rates in fire insurance because the premium rate is based on the burning rate or incidence of loss, which is a scientific prob-

[15] The status of existing state laws is considered *infra*, pp. [illegible], *et seq.* Many of these statutes include other safeguards against the uncontrolled establishment of rates by insurance combinations.

ability which can be accurately measured. It is argued that there can be only one correct rate for a given risk, that the companies must be allowed to get together to pool their experience in order to determine scientifically the probability of loss on which the rate is to be based, and that they should cooperate in inspecting properties for rating purposes.[16]

If we assume all this to be true, it does not support appellees' position. In the first place, a cooperative statistical venture truly designed to accomplish only the purpose of providing a scientific basis for the rate structure would not be an unreasonable restraint of trade. Secondly, and even more important, the rating bureau system which is sought to be defended through the appeal to science is not engaged in the function of ascertaining the statistical probability of loss.

(a) There is, of course, a large area in which insurance companies may cooperate on matters of joint interest which do not extend to the fixing of rates. Some of the writers quoted by the appellees in support of cooperation in rate-fixing were referring in part to such other advantages of cooperation as joint action for more adequate supervision of risks, the study of hazards and reduction of incendiarism.[17] The Government does

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[16] Gephart, W. F., *Principles of Insurance* (1917), Vol. II: *Fire*—pp. 125-128, 280, 291.

[17] Zartman and Price, *Yale Readings in Insurance—Property Insurance* (1914), pp. 243-246.

not take issue with any such forms of cooperation. Nor is there any prohibition in the Sherman Act against the exchange of experience by companies and their cooperation in the classification and evaluation of this experience and the compilation of statistical data therefrom. (Cf. *Maple Flooring Assn.* v. *United States*, 268 U. S. 563.) It may be highly desirable for the loss experience of fire-insurance companies to be pooled and analyzed in order that the scientific basis of the industry may approach the accuracy of life insurance. A legitimate function of a joint bureau, such as the present rating bureaus, may well be the formation of burning tables, similar to the mortality tables of life insurance, showing the probability of loss on a property with given characteristics. It may also be conceded as desirable to have such joint bureaus inspect and classify risks, both to reduce costs, and to get more uniform data for scientific rating of hazards. Classification of the risk based on such joint inspection would not mean, however, that the price charged for insuring it would necessarily be the same for all companies.

(b) (i) Even if it be assumed that the rating bureaus scientifically determine the probability of loss on particular properties, this would not justify the establishment of uniform premium rates for all companies. The final premium rates should be sufficient to cover (1) the amount nec-

essary to pay losses, including an amount sufficient to maintain adequate reserves against conflagrations, (2) the administrative expenses, and (3) profits.[18] It is only the first of these factors which is not subject to the control of the individual company, and as to which the joint use of common experience would result in uniformity.

The most scientific determination of the burning rate would not mean that the expenses of all companies are or should be the same, much less their profits. A comparison with life insurance will illustrate the point made. In the practice of fixing life-insurance premiums, while all or most of the companies base their rates on the same tables of mortality, they modify these tables in use to conform with their own experience, use different interest rates and different factors for administrative expense, and come out in the end with different rates to the buyer of life insurance.[19]

The rating bureaus do not determine, on a statistical basis or otherwise, the amount necessary to pay losses (the burning rate), but fix the final premium charged to the insured. If the burning rate were the dominant factor in the final premium, and overhead costs and profits

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[18] Gephart, W. F., *Principles of Insurance*, 1917, Vol. II: *Fire*, p. 104, Moore, F. C., *Fire Insurance and How To Build*, 1903, p. 6.

[19] TNEC Hearings, part 10, pp. 4234–6, 4251, 4253.

merely incidental, there might be little reason to require a differentiation. But it can almost be said that the contrary is true. The record in this case shows that during the ten-year period 1931–1940, in the six southeastern states, fire insurance premiums received by stock companies amounted to $436,000,000, while losses paid amounted to $197,000,000 (R. 8).[20] These figures cover a sufficiently broad geographical area and a sufficiently long period of time to be representative. They show that only about 45 percent of the amount paid by policyholders is necessary to cover the burning rate. This figure leaves a great deal of room for free play between the burning rate and the final premium charged the policyholder.[21]

Appellees are not charged with agreeing on the burning rate, but upon the final premium rate. It does not follow that because cooperation as to the former might be reasonable, both in a general economic sense and within the meaning of the "rule of reason" under the antitrust law, companies must be permitted to use statistical bureaus, as they have, to establish uniform final premium rates and thereby eliminate competi-

[20] These figures are compiled from *Best's Insurance Reports, Fire and Marine* (1942).

[21] See also 89 Cong. Rec. (Dec. 9, 1943) A5777, in which appears a table showing that the percentage of losses to premiums in a selected group of states and the District of Columbia ranges from 24.5 to 50.9.

tion altogether. As this Court knows, statistical organizations controlled by members of an industry are prone to do more than engage in the legitimate function of exchanging information (*Sugar Institute* v. *United States*, 297 U. S. 553; *American Column Co.* v. *United States*, 257 U. S. 377), and the insurance industry is no exception in this respect. The rating bureaus, as now employed to fix rates, go far beyond their economic justification.

(ii) Even the legitimate function of using the pooled experience of the industry to determine an accurate burning rate is not performed under the present rating bureau system. The actual fixing of rates in fire insurance is admitted by the writers on the subject to be based on arbitrary judgment and to have no statistical foundation in experience.[22] The most common method of rating, particularly by rating bureaus such as in the case at bar, is so-called schedule rating. The schedules in common use set forth a base rate (originally determined by the judgment of a group of underwriters) per $100 of insurance for a certain type building designated as standard, and list several hundred charges and credits by which this base rate is to be modified for particular factors held to increase or decrease the risk, such as differences in construction, proximity to a hydrant, the fire-fighting facilities of the city, etc. In using one of the two most popular schedules, the Dean or Analytic Schedule, to rate a particular building, an

[22] "The first [method of fixing rates] is to take the three elements of loss, expense, and profit, without giving particu-

underwriter first selects one of several tables of base rates (ranging from 60c to 120c) which he considers best applicable to his area, then chooses one of six classes of cities, and finally adds and subtracts scheduled percentages for the particular characteristics of the building. In the other schedule, all modifications are made by flat amounts applied to a 25c base rate for a standard building in a standard city.[22a] The rate arrived at by using such a schedule is supposed to cover profits and expenses as well as fire losses.

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ment rate which will represent the whole. That is the method of the fire insurance companies. It is antiquated, out of date, and often discriminatory. * * * 'No progress has been made by the fire underwriters during the past fifty years towards bringing their rate-making method to a scientific basis of true costs * * *.'" Francis J. De Celles, Massachusetts Commissioner of Insurance, *The Legal Aspects of Insurance Cost and Coverage* (American Management Association, 1936), pp. 9, 11; Pink, Louis H., *The Problem of Fire Rates* (Report to the Superintendent of Insurance, New York State, by the Department Staff) (1942), pp. 8–9, 11, 14, 17–18; E. G. Richards, *The Experience Grading and Rating Schedule* (1921); Gephart, *op. cit.* pp. 115–120, 123; Mowbray, A. H., *Insurance, Its Theory and Practice in the United States* (1937), pp. 328–330; Zartman and Price, *Yale Readings in Insurance, Property Insurance* (1914), pp. 165–180, esp. pp. 173, 232; Reed, Prentiss B., *Fire Insurance Underwriting* (1940), p. 265; Huebner, S. S., *Property Insurance* (1922), pp. 238–240, 244, 245–258, esp. p. 256; Dean, A. F., *The Philosophy of Fire Insurance* (1925); Vol. I, pp. 79, 209–210, 254–255.

[22a] For a copy of this schedule, see Moore, *Fire Insurance & How to Build*, pp. 621–843.

Despite the mathematical appearance of the factors entering into the determination of the final rate, neither the base rate (for an arbitrarily selected standard building in a standard city) nor the deviations therefrom are based on any objective analysis of loss experience." The data necessary

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[22] The recent report by the staff of the New York Superintendent of Insurance, cited in the preceding note, states (pp. 8, 9, 14, 17): "The base rate is intended to represent the charge for a standard building, unoccupied and unexposed, in a standard city. It has no statistical basis.

* * * * * * * * "the key rate is not applied uniformly in all schedules nor does it reflect in any way the actual loss experience of the community.

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"The charges reflecting occupancy hazards are not supported by classified experience. There are varying occupancy charges for similar occupancy classes when written under different schedules.

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"Contents rates and differentials are not determined by statistical experience.

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"The statistical classification and rating methods have fallen further and further out of line. At the present time, the experience report has little relationship to rating methods. Many statistical classes include risks rated on several different schedules as well as class-rated risks. They also include groupings of widely different classes of risks of high-rated and low-rated occupancies. For all but one class the experience is that of buildings and contents combined. As a result of the conglomerate nature of such statistics, accurate adjustment of rates cannot be made.

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"A review of fire insurance rating systems reveals two weaknesses: lack of proper statistical information and rating methods unsupported by statistical experience."

for such an analysis are not available and are not being collected."[34] The base rate in particular, which is supposed to express "the unanalyzable parts of the hazard,"[35] represents an arbitrary exercise of judgment. Whatever theoretical justification there may be for permitting companies to combine for the purpose of determining a scientifically accurate premium based on statistical studies of the burning rate, this justification cannot be advanced for the present practices of the companies named in the indictment. The facts of the industry do not show that the price of fire insurance is determined by such scientific methods as to justify removing it from the checks and balances of competitive forces sought to be safeguarded by the Sherman Act.

2. It is often said that the effect of a purely competitive system of rate making is to permit bargaining by each patron with each insurance company in a manner which leads to discrimination between policy holders similarly situated and completely breaks down the rate structure.[36] We

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[34] Many officials and writers have suggested the desirability of basing rates on a statistical analysis of experience. See authorities cited, note 22, *supra*. A plan for a new type of schedule to be based upon statistical data was proposed in 1915 and again in 1921. See Richards, *loc. cit. supra*.

[35] Gephart, *op. cit.*, p. 115; Dean, *op. cit.*, pp. 210, 252.

[36] Dean, A. F., *The Philosophy of Fire Insurance* (1925), Vol. I, pp. 32, 135–137; Huebner, S. S., *Property Insurance* (1938), pp. 347–348.

agree that discrimination between policy holders of the same company is unfair and contrary to the public interest. But the Sherman Act does not prohibit each company from adopting a uniform rating policy any more than it prohibits a seller of commodities from establishing a uniform price for his products. Furthermore, as appellees pointed out in their brief below (p. 29), 36 of the states have laws prohibiting discrimination in rate making, and 43 state laws prohibit the rebating of premiums.[fn] Such statutes are, of course, entirely consistent with the Sherman Act.

The competitive system which the Sherman Act protects thus does not require discrimination in the rates charged by each company. There is a vast difference, however, between the establishment of a policy of uniform rates for comparable risks by each company separately and an agreement between all of the companies that all shall charge the same rates.

It may be argued that if the companies are required to compete, they will inevitably be driven to cutting rates to individual purchasers in order to get business. This does not necessarily follow. Department stores on the same block compete, but each as a matter of business policy charges its own customers the same prices. The need for such a policy is even stronger in the insurance

[fn] The State statutes are summarized in *The Spectator, Fire Insurance Laws, Taxes and Fees, 1942.*

business. Since it is imposed on the companies by law in most states, it can not be assumed that the companies will fail to adhere to it if they are required to compete in other respects.

Finally, it is urged that rate competition would favor the more powerful customers, who could bargain for lower rates to the detriment of the purchasers of smaller quantities of insurance. The same can, of course, be said for any industry. Moreover the present system has resulted in establishing just this sort of rate discrimination.

It is well known in the industry that there are classes of "preferred risks," which are not necessarily properties less likely to burn, but those on which the premium is disproportionately high.[27] The companies "have found that they can levy high rates on dwellings, on contents of dwellings, on churches, on schoolhouses, public buildings, and kindred risks without causing much opposition," but that on "mercantile or factory risks" the opposition of "leading businessmen" will force rates down.[28] This proportion exists not only between commercial and other property, but between large and small businesses. A recent tabulation shows that on many types of large factories, the ratio of

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[27] Zartman and Price, *op. cit.*, pp. 233–234; Mowbray, *op. cit.*, pp. 310, 328, 362, 367; De Celles, *op. cit.*, p. 9.

[28] See Zartman and Price, *loc. cit.* Although this book was written in 1909 and 1914, there is no reason to believe that there has been any change in conditions in this respect.

losses to premiums paid is over 100 percent, on small factories slightly over 50 percent, and on retail stores 17.42 percent.[29] The companies obviously make up their undercharges to the large customers, who are in a position to insure through other facilities, such as mutuals and reciprocals, through excessive charges to the small customers. The entire rate structure is thus loaded against the little man at the present time. Competition between the companies would give him, as well as the large purchasers of insurance, the opportunity to obtain more favorable rates.

3. It is contended that the public's primary concern in the insurance industry is the solvency of the companies and their ability to meet all claims, and that competition among the companies is incompatible with their financial stability.[30]

Again we agree that a first requisite in the insurance business is the soundness of the companies. And it may be that completely unrestricted competition among insurance companies, as among railroads, would be harmful to the public. But application of the Sherman Act to the insurance business does not pose any such "black

[29] See 89 Cong. Rec. (Dec. 9, 1943), A5777.

[30] Moore, F. C., *Fire Insurance and How To Build* (1903), p. 33; Mowbray, A. H., *Insurance, Its Theory and Practice in the United States* (1937), pp. 315, 444; Huebner, S. S., *Property Insurance* (1938), pp. 347–348.

or white" problem. The evils of excessive competition can be, and in fact have been, avoided by lawful means less drastic than the complete elimination of competition in rates.

In the first place, we have already pointed out that a system for the cooperative establishment of burning rates would of itself remedy many of the evils feared by appellees[21] without running afoul of the antitrust laws. We think it not improbable that if the fixing of premium rates by the present bureaus were held to be unlawful, rating bureaus might still remain in existence in order to perform the functions of inspecting and evaluating risks and of establishing burning rates on an over-all experience basis. Secondly, application of the Sherman Act would not necessarily permit discrimination between purchasers similarly situated, for the reasons indicated *supra*, pp. ~~115–117.~~ 116-119.

Thirdly, the soundness of an insurance company's financial position can be guaranteed by measures which do not prevent the companies from competing. Regulations of this sort are found in all the states. A minimum capital and the deposit of funds as security are commonly required. Investments must be in specified types of securities, chosen because of their safety. Other state laws designed to preserve solvency are those

[21] The present rating bureau system does not perform the statistical services which it is claimed are essential to the efficient operation of the industry.

relating to impairment of capital, unearned premium reserve, and limits on the amount of insurance permitted on a single risk. The books of the companies are subject to examination by state officials.[32] If such regulations are not thought sufficient to guarantee the soundness of the companies, they can be made more stringent, particularly through adequate reserve and reinsurance provisions, and through limiting the amount of liability which a company may assume in any single area susceptible to being involved in the same conflagration.[33] It is thus possible to safeguard the condition of the industry within a competitive framework.[34] Moreover, if rate competition is thought to be unwise, the state governments can, as a few of them have, establish the rates themselves, either as a general matter or when rates become too low; rates so fixed by the states would not be affected by the Sherman Act (*Parker* v. *Brown*, 317 U. S. 341).

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[32] The fire insurance laws of all the states are summarized in *The Spectator, Fire Insurance Laws, Taxes and Fees, 1942.*

[33] Cf. 27 McKinney's Consol. L. Ann. (N. Y., 1940), § 319, which provides limits for cooperative fire insurance companies. Other states restrict the insurance which maye be susceptible to a single conflagration. Comp. Stat. Neb. 1929, §§ 44–704; Mont. Rev. Codes Ann. (1935), § 6136; Remington's Rev. Stat. Ann. (Wash. 1932), § 7153.

[34] The companies themselves have voluntarily adopted many of these practices. See Mowbray, *op cit.* pp. 370–374; Huebner, *op. cit.* pp. 179–188; Reed, *op. cit.* pp. 45–58, 308–316.

Finally, it is worth noting that experience demonstrates that competition is not necessarily detrimental to the financial well-being of insurance companies. Lloyds of London is a well-known example of an insurance business conducted not only in competition with other companies but in which the Lloyds underwriters compete among themselves. Indeed Lloyds is so organized as to permit brokers to move freely from one underwriter to another in order to obtain the best proposition.[35] And yet, if we may understate, Lloyds is not regarded as a less reliable insurer than other companies.[36] There is also rate competition among companies in other fields of insurance, such as life insurance. (See p. 111, *supra*.) Companies in these fields are not thought to be less stable than the fire insurance companies.

We do not ask the Court to decide for itself, as a matter of economic fact, whether and to what extent rate competition among fire insurance companies is beneficial. But we think that the above observations show that the economic problem is not as to the effect of requiring insurance companies to operate in a completely free and

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[35] See M. M. Beeman, *Lloyd's London* (2nd ed., Kingswood, Surrey, 1937); Charles Wright and C. Ernest Fayle, *A History of Lloyds* (London 1928).

[36] Beeman, *loc. cit. supra*, p. 96, states that in the last thirty years no holder of a Lloyd's policy has suffered a loss through the failure of an underwriter. The same cannot be said of other types of insurance companies.

unrestrained competitive market, but as to the application of a prohibition against unreasonable restraints of trade in a setting in which the activities of the companies are already to a large extent lawfully confined. For all other industries requiring special treatment, the answer has been that, except as otherwise expressly provided by statute, the antitrust laws apply. The effect of an unregulated price-fixing combination in the insurance field is not so different from those in other industries as to demonstrate that Congress must have intended that insurance be governed by a different rule.

E. THE EFFECT OF A DECISION THAT INSURANCE IS COMMERCE AND SUBJECT TO THE SHERMAN ACT UPON STATE LEGISLATION

Appellees have urged that a reversal of this Court's past doctrine so as to subject insurance to the Sherman Act would nullify the large body of state laws regulating the insurance business. We do not believe that the interpretation of the Sherman Act can depend upon its effect upon state legislation. It is for Congress not the States to determine the policy by which interstate commerce is to be governed. The history of the Act discloses no congressional intention to subordinate the statute to the policies of the states.

But in any event, we do not believe that the consequences of applying the act to insurance

would be as disturbing to state regulation as has been suggested.

1. A decision that insurance is commerce within the meaning of the commerce clause would not in itself invalidate the state taxing and regulatory statutes. The states may tax and regulate interstate commerce if they do not unduly "burden" it. In determining the existence of an unreasonable burden the Court weighs and accommodates "the competing demands of the state and national interests involved" (*Parker* v. *Brown*, 317 U. S. 341, 362; *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 505; *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177; *California* v. *Thompson*, 313 U. S. 109; *Duckworth* v. *Arkansas*, 314 U. S. 390; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33).[37]

[37] With respect to the cases upholding state taxation, the Court has stated the reasoning underlying recent decisions as follows: "* * * this Court has sustained a nondiscriminatory tax on the sale to a buyer within the taxing state of a commodity shipped interstate in performance of the sales contract, not upon the ground that the delivery was not a part of interstate commerce, see *East Ohio Gas Co.* v. *Tax Commission*, *supra*, but because the tax was not a prohibited regulation of, or burden on, that commerce (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 50." *Illinois Gas* case, *supra*, 314 U. S. 498, at 505). As to the power of the states to regulate interstate prices and rates of a local character, see *Milk Control Board* v. *Eisenberg Farm Products Co.*, 306 U. S. 346; *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23; *Port Richmond Ferry Co.* v. *Hudson County*, 234 U. S. 317; *Illinois Natural Gas Co.* v. *Central Pub. Serv. Co.*, *supra*, at 505.

This is to be determined in accordance with "all the relevant facts and circumstances" indicating whether "the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress" (*Parker* v. *Brown*, 317 U. S., at 362).

The early insurance cases in themselves manifest the Court's belief that insurance was a proper subject for local regulation. Indeed, the unnecessary statement that "insurance is not commerce" grew out of the Court's fear that state regulation would otherwise have been impossible.[28] This result we now know does not follow. Nevertheless, to the extent that the insurance cases properly recognized the need for local regulation of insurance in the absence of a federal law, they may

[28] This was the meaning of the statement in *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, at 502, that "To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision." Since the *Deer Lodge* case itself, as well as its predecessors, involved attacks upon state legislation, it was true that a reversal of the prior decisions in that case would have outlawed state regulation of and taxes upon insurance generally, and this was precisely what the insurance companies sought. But that is not true when only the scope of the power of Congress is in issue, as it is here.

still be given effect, and we see no reason why they should not be."[39]

2. Even if the commerce clause would not of itself invalidate state regulation if the insurance business is held to be in commerce, state laws could not, of course, stand to the extent that they are inconsistent with a valid federal statute. It is appellees' contention that application of the Sherman Act to the fire-insurance industry would nullify the state regulatory systems. As has been indicated, we do not think that this is a relevant consideration. Furthermore, the supposed conflict between the Sherman Act and state legislation is greatly exaggerated.

State laws prescribing qualifications necessary for doing business in order to safeguard the interests of policyholders, regulating reserves and investments, providing for the inspection of books and the filing of rates and reports, and prescribing qualifications for agents obviously are not affected by the Sherman Act. The same is true of state antidiscrimination and antirebate laws, and statutes requiring each company to adhere uniformly to rates on file with the state insurance commissioner;[40] these measures do not require an insurance company to engage in conduct which would violate the antitrust law. (See p. 118, *supra*.) Nor would the Act invalidate state statutes which

[39] See pp. 25–30, *supra*.

[40] Cf. *Chicago & N. W. R. Co.* v. *Fuller*, 17 Wall 560.

provide for determination by the state of standard forms of policies and coverage, or of rates and commissions. This Court expressly held in *Parker* v. *Brown*, 317 U. S. 341, that the Act was not intended to and did not apply to state action.

A type of state law which would conflict with the Sherman Act would be one which authorizes a private combination of insurance companies to fix premium rates without the approval of any state authority. The states cannot, of course, nullify the federal act by authorizing private persons or groups subject to the antitrust law to do what that Act forbids. "* * * a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful * * *" (*Parker* v. *Brown*, *supra*, at 351; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 332, 344–347).

This limitation would affect the laws of a number of states. But the states by no means have a uniform policy against permitting rate competition among fire insurance companies. Thirteen states have no law which even mentions rate agreements or rate-making organizations.[41] The laws of six states specifically prohibit any combination for the purpose of fixing insurance

[41] Alabama, California, Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, Montana, Oklahoma, Rhode Island, Tennessee, and Utah. The same is true as to the District of Columbia.

rates [42] and contain no authorization of rating bureaus or similar organizations. Texas provides for the fixing of rates by the state itself, and Nevada requires rates filed by every fire insurance company to be approved by the State Commissioner before becoming effective.[43] Five states require the establishment of rating bureaus by the industry, but provide that the rates fixed shall not become effective until approved by the proper state authorities.[44] In six states the statutes warrant the conclusion that the rating bureaus are

[42] Ariz. Code Ann. (1939), § 74–101 et seq.; Ga. Code Ann. (1937), § 56–219; Iowa Code (1939), § 9010; Gen. Stat. Kan. (Corrick, 1935), §§ 50–101, 50–112; Comp. Stat. Neb. (1929), §§ 44–321, 59–101, 59–301; Rev. L. N. H. (1942), ch. 325, § 15 [rate agreements among foreign insurance companies licensed to do business in New Hampshire].

[43] Vernon's Rev. Civ. Stat. (Texas, 1940), Art. 4878 et seq.; Nev. Comp. L. (Supp. 1931–1941), § 3656.121. Many other state laws authorize administrative officials to order changes in insurance rates if they think them excessive or, in some cases, inadequate, but do not provide for the state fixing of rates in all circumstances: Ark. Stat. (Pope, 1937), § 7730; Colo. Stat. Ann. (1935), ch. 87, § 157; Ind. Stat. Ann. (Burns, 1933), § 39–4310(1); Gen. Stat. Kan. (Corrick, 1935), § 40–913; Ky. Rev. Stat. (1942), § 298.290; Mich. Stat. Ann. (Henderson, 1937), § 24.51; Miss. Code Ann. (1930), § 5311; Mo. Rev. Stat. Ann. (1943), § 5984; 27 McKinney's Cons. L. Ann. (N. Y., 1940), §§ 184 (4) and 186; Okla. Stat. Ann. (1941), Title 36, § 134; Code S. C. (1942), § 8016; W. Va. Code (1941 Cum. Supp.), § 3379 (d); Wis. Stat. (1941), § 203.39; and Wyo. Rev. Stat. (1931), § 57–217.

[44] La. Gen. Stat. (Dart, 1939), § 4222; Minn. Stat. (1941), § 71.06 [general rate increases]; Miss. Code Ann. (1930), § 5302; S. D. Code (1939), § 31.3705 [general flat changes in rates]; Va. Code (1942), §§ 4314 (1), 4314 (8).

authorized to perform mainly statistical functions and that they are not to be employed as devices for completely eliminating rate competition among the companies."[45] In eleven states rating bureaus are permitted to agree upon rates, but these rates are to be filed with the State Commissioner subject to his disapproval or his general power to reduce rates."[46] The laws of only five states expressly or impliedly authorize or require rating bureaus to establish rates which are not subject to the approval or disapproval of any governmental agency."[47] This summary of the state statutes shows that twenty-one states either expressly forbid the companies to combine for the

[45] Mich. Stat. Ann. (Henderson, 1937), §§ 24.52, 24.54, 24.99–24.101; Mo. Rev. Stat. Ann. (1943), §§ 5972, 8302, 8304; N. J. Stat. Ann. (1939), § 17.29–6; N. M. Stat. (1941), § 60–610; Ore. Comp. L. Ann. (1940), §§ 101–142, 101–1605 (1), 101–1605 (8); Remington's Rev. Stat. Ann. (Wash., 1932), §§ 7076, 7118, 7119.

[46] Ark. Stat. (Pope, 1937), §§ 7730, 7733–7735; Colo. Stat. Ann. (1935), ch. 87, §§ 157–160; Ind. Stat. Ann. (Burns, 1933), §§ 39–4310(l)–(o); Ky. Rev. Stat. (1942), §§ 298.290, 298.300; 27 McKinney's Cons. L. Ann. (N. Y., 1940), §§ 181, 183–186; Throckmorton's Ohio Code Ann. (Baldwin, 1940), §§ 9592–12 through 9592–14; Code S. C. (1942), §§ 8003–8014, 8016; Vt. Pub. L. (1933), §§ 7118–7126; W. Va. Code (1941 Cum. Supp.), §§ 3370–3372, 3379 (d); Wis. Stat. (1941), §§ 203.33–203.34, 203.39–203.40; Wyo. Rev. Stat. (1931), §§ 57–216, 57–217. As to nine of these states see note 43, *supra*.

[47] Idaho Code Ann. (1932), § 40–1601; Jones' Ill. Stat. Ann. (1939), §§ 66.1099–66.1115; N. C. Code (Michie, 1939), §§ 6388–6393; L. N. D., 1929, ch. 152, §§ 1–3; Pa. Stat. Ann. (Purdon, 1930), Title 40, §§ 53–55. In North Carolina, the State Insurance Commissioner may hold a hearing with

making of rates or do not authorize such conduct in any way." In six states, rating bureaus would appear to be authorized to make only actuarial recommendations, and not joint agreements upon rates. In the five states in which rates determined by joint bureaus do not become effective until the approval of the state commissioner has been obtained, a rate so approved might well become the act of the state government. Cf. *Parker* v. *Brown*, 317 U. S. 341. In all of these states the fixing of rates by private combinations is not sanctioned by state law. This leaves only those five states which authorize the rating bureaus created by the industry to fix rates generally without governmental check and the eleven states in which bureau-fixed rates may be operative unless disapproved by state authorities. The Sherman Act would apply to rates fixed in the first of these two groups, inasmuch as a state cannot by law authorize private conduct which the Sherman Act forbids. *Ibid.* Whether rates fixed in the latter group would be unlawful might depend upon how they were established. If approved by the state commissioner, or independently promulgated by him (as is possible in nine of the eleven states),[49] they might be re-

respect to the adequacy of the rates agreed upon and publicize his conclusions, but has no power to veto such rates except where they are discriminatory within a class of hazard.

[48] See notes 41, 42, 43, *supra*.

[49] In at least nine of these eleven states (see note 43, *supra*) the commissioners may order reductions in rates.

garded as the act of the state; if the effective rate were that established by the bureau in the absence of any official approval, it would appear to be the act of a private combination and subject to the anti-trust law.[80] In, at most, two of the states covered by the indictment (North Carolina and South Carolina) do the statutes purport to authorize private combinations to fix rates without public approval,[81] and in neither of these would appellees' attempt to enforce their rating policies by boycott and coercion find any support.[82]

This review of the relationship between the anti-trust law and state insurance legislation demonstrates that the states have no uniform policy

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[80] The Court, of course, cannot pass upon the status of the various laws or the rates established under them on the record in this case.

[81] Of the six states involved in this litigation three (Alabama, Florida, Georgia) have no statutes authorizing rating bureaus. Virginia requires membership in a rating bureau but provides that no rates shall become operative until approved by the state commissioner. South Carolina permits membership in rating bureaus, but the state commissioner may disapprove any rate agreement and may also order changes in rates. Only in North Carolina is there any implied authorization for the operation of rating bureaus without ultimate power in the state commissioner to supervise the rate structure. The Florida Supreme Court has held that the rating-bureau system does not violate the antitrust law of that state. *Brock* v. *Hardie*, 114 Fla. 670, 154 So. 690 (1934). The Georgia Supreme Court has held that the by-laws of the Atlanta Association of Fire Insurance Agents, which required members to engage in substantially the same activities as are alleged in the present indictment, violate the laws of Georgia. *Atlanta Association of Fire Insurance Agents* v. *McDonald*, 181 Ga. 105 (1935).

[82] Both North Carolina and South Carolina have statutes forbidding coercive tactics. See note 98, *infra*.

concerning the regulation or control of fire insurance rates, and that no such destruction of the regulatory systems established by the states as has been suggested by appellees is to be feared. The states can, as many of them have, regulate the fire insurance industry in a manner entirely compatible with the Sherman Act. In these circumstances, the effect of the Act upon state legislation is certainly not sufficient to warrant a restrictive interpretation contrary to its language and purposes.

It should be noted that the arguments advanced by appellees as to why competition is undesirable, and the state statutes upon which they rely, are concerned only with competition in the fixing of rates. None purport to justify or protect the coercive tactics with which appellees are charged. The proponents of a non-competitive rating system have not gone so far as to suggest that the insurance companies should not only be allowed to agree upon rates among themselves but to coerce all other agents and companies to join with them. No one, so far as we know, has advocated that such boycotts as are alleged in this case, directed at uncooperative companies, and agents and purchasers who deal with them, should be any more legitimate in the insurance industry than any other. The Report of the Joint Committee of the Senate and Assembly of the State of New York (Merritt Report, 1911) upon which appellees have relied, states that although the companies should be permitted to maintain proper rate making associations, "they must not seek to strengthen their

own agreement by forcing third persons to help them do so" (p. 125). And the laws of several of the states which permit rating bureaus to operate expressly proscribe conduct of this sort.[53]

Acceptance of appellees' arguments that insurance should be wholly exempt from the Sherman Act would allow them to continue to coerce any companies which sought to compete with them on a rate basis and to boycott any agents and customers who had the temerity to deal with such competitors.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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[53] 27 McKinney's Cons. L. Ann. (N. Y., 1940), § 181 (7); N. C. Code (Michie, 1939), § 6432; N. D. Comp. L. (Supp. 1913–1925), § 4964a1; Ore. Comp. L. Ann. (1940), § 101–142; Code S. C. (1942), § 8018; Vt. Pub. L. (1933), § 7124.

APPENDIX

APPELLEE FIRE INSURANCE COMPANIES

Total direct premium writings during the year 1941 compared with direct writings in the State of incorporation and in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia

Company	State of incorporation	Premium income (fire and allied lines)	Premium income from home State	Percent derived from home State	Premium income from other States	Percent derived from other States	Premium income from S. E. U. A. territory	Percent derived from S. E. U. A. territory
Aetna Insurance Company	Connecticut	$27,473,940	$575,000	2.10	*$26,898,940	97.90	$2,735,000	9.95
Agricultural Insurance Company	New York	8,185,449	2,213,000	27.04	*5,972,449	72.96	562,000	6.87
Albany Insurance Company	New York	1,329,248	230,000	17.30	1,099,248	82.70	147,000	11.06
The Allemannia Fire Insurance Company of Pittsburgh	Pennsylvania	1,557,245	289,000	18.59	*1,268,245	81.44	140,000	8.99
The Alliance Insurance Company	Pennsylvania	3,857,778	593,000	15.37	*3,264,778	84.63	216,000	6.60
American Alliance Insurance Company	New York	2,769,891	560,000	20.22	*2,209,891	79.78	287,000	10.36
American and Foreign Insurance Company	New York	2,542,234	1,212,000	47.67	1,330,234	52.33	131,000	5.15
American Central Insurance Company	Missouri	3,620,344	204,000	5.63	*3,416,344	94.37	226,000	6.24
American Eagle Fire Insurance Company	New York	5,496,775	1,264,000	23.00	4,232,775	77.00	571,000	10.39
American Equitable Assurance Company of New York	New York	6,220,538	1,538,000	24.72	*4,682,538	75.28	351,000	5.64
American Fire Insurance Company	Texas	262,636	6,000	2.28	256,636	97.72	9,000	3.43
American Home Fire Assurance Company	New York	1,374,720	116,000	8.44	*1,258,720	91.56	186,000	13.53
American Indemnity Company	Texas	3,216,852	758,000	23.56	2,458,852	76.44	312,000	9.70
The American Insurance Company	New Jersey	15,053,506	1,306,000	8.68	*13,747,506	91.32	1,480,000	9.83
American Union Insurance Company of New York	New York	1,102,513	181,000	16.42	921,513	83.58	72,000	6.53
Anchor Insurance Company	Rhode Island	626,319	7,000	1.12	*619,319	98.88	57,000	9.10
Atlas Assurance Company, Ltd	England	4,712,478			*4,712,478	100.00	431,000	9.15
The Automobile Insurance Company of Hartford Connecticut.	Connecticut	18,188,546	593,000	3.26	*17,595,546	96.74	1,350,000	7.42
The Baltimore American Insurance Company of New York	New York	2,625,341	267,000	10.17	*2,358,341	89.83	262,000	9.98

*Includes some direct writings in foreign countries.

Bankers & Shippers Insurance Company of New York	New York	4,813,747	677,000	14.06	*4,136,747	85.94	443,000	9.20
Birmingham Fire Insurance Company of Pennsylvania	Pennsylvania	1,010,181	135,000	13.36	*875,181	86.64	134,000	13.26
Boston Insurance Company	Massachusetts	7,054,148	1,389,000	19.69	*5,665,148	80.31	498,000	7.06
British America Assurance Company	Canada	309,536	1,000	3.26	*308,536	99.68	42,000	13.57
British General Insurance Company, Ltd	England	445,950			445,950	100.00	100,000	22.42
Caledonian-American Insurance Company	New York	600,987	44,000	7.32	*556,987	92.68	12,000	2.00
Caledonian Insurance Company	Scotland	2,682,409			2,682,409	100.00	211,000	7.87
The California Insurance Company	California	2,353,427	412,000	17.51	*1,941,427	82.49	321,000	13.64
Camden Fire Insurance Association	New Jersey	6,440,928	797,000	12.37	*5,643,928	87.63	518,000	8.04
Capital Fire Insurance Company of California	California	861,752	114,000	13.23	747,752	86.77	50,000	5.80
The Carolina Insurance Company	North Carolina	1,749,392	932,000	53.28	817,392	46.72	1,001,000	57.22
Central Insurance Company of Baltimore	Maryland	2,527,774	758,000	29.99	1,769,774	70.01	235,000	9.30
Central Union Insurance Company	New Jersey	482,222	34,000	7.05	*448,222	92.95	10,000	2.07
Century Insurance Company, Ltd	England	1,197,623			1,197,623	100.00	77,000	6.43
The Charter Oak Fire Insurance Company	Connecticut	936,407	43,000	4.59	893,407	95.41	53,000	5.66
Citizens Insurance Company of New Jersey	New Jersey	3,729,108	40,000	1.07	*3,689,108	98.93	754,000	20.22
City of New York Insurance Company	New York	2,873,195	459,000	15.98	*2,414,195	84.02	215,000	7.48
The Columbia Fire Insurance Company	Ohio	1,596,156	160,000	10.02	1,436,156	89.98	268,000	16.79
Columbia Insurance Company of New York	New York	1,451,315	193,000	13.30	*1,258,315	86.70	98,000	6.75
Commerce Insurance Company	New York	1,568,018	431,000	27.49	1,137,018	72.51	210,000	13.39
Commercial Union Assurance Company, Ltd	England	5,791,698			*5,791,698	100.00	500,000	8.63
Commercial Union Fire Insurance Company of New York	New York	1,971,765	169,000	8.57	*1,802,765	91.43	312,000	15.82
The Commonwealth Insurance Company of New York	New York	2,657,615	416,000	15.65	*2,241,615	84.35	141,000	5.31
The Concordia Fire Insurance Company of Milwaukee	Wisconsin	2,453,054	228,000	9.29	2,225,054	90.71	205,000	8.36
The Connecticut Fire Insurance Company	Connecticut	6,549,189	158,000	2.41	*6,391,189	97.59	203,000	3.10
Continental Insurance Company	New York	30,272,000	7,840,000	25.90	*22,432,000	74.10	1,409,000	4.65
County Fire Insurance Company	Pennsylvania	738,886	107,000	14.48	631,886	85.52	105,000	14.21
Detroit Fire and Marine Insurance Company	Michigan	1,526,159	495,000	32.43	*1,031,159	67.57	228,000	14.94
Dixie Fire Insurance Company	North Carolina	1,882,486	344,000	18.27	1,538,486	81.73	636,000	33.79
The Eagle Fire Company of New York	New York	904,263	87,000	9.62	*817,263	90.38	102,000	11.28
Eagle Star Insurance Company, Ltd	England	4,539,183			4,539,183	100.00	177,000	3.90
East & West Insurance Company of New Haven	Connecticut	646,581	65,000	10.05	581,581	89.95	45,000	6.96
Empire State Insurance Company	New York	1,446,401	360,000	24.89	1,086,401	75.11	237,000	16.39

*Includes some direct writings in foreign countries.

Total direct premium writings during the year 1941 compared with direct writings in the State of incorporation and in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia—Continued

Company	State of incorporation	Premium income (fire and allied lines)	Premium income from home State	Percent derived from home State	Premium income from other States	Percent derived from other States	Premium income from S. E. U. A. territory	Percent derived from S. E. U. A. territory
The Employers' Fire Insurance Company	Massachusetts	$4,881,490	$573,000	11.74	*$4,308,490	88.26	$208,000	4.26
Equitable Fire and Marine Insurance Company	Rhode Island	2,238,407	68,000	3.04	*2,170,406	96.96	181,000	8.09
Equitable Fire Insurance Company	South Carolina	201,254	253,010	86.87	38,244	13.13	201,254	100.00
Export Insurance Company	New York	1,190,751	397,000	33.34	793,751	66.66	159,000	13.35
Federal Insurance Company	New Jersey	17,434,660	329,000	1.89	*17,105,660	98.11	636,000	3.65
Federal Union Insurance Company	Illinois	1,418,909	117,000	8.25	1,301,909	91.75	178,000	12.54
Fidelity & Guaranty Fire Corp	Maryland	7,334,000	357,000	4.87	*6,977,000	95.13	554,000	7.55
Fidelity-Phoenix Fire Insurance Company	New York	16,812,527	2,387,000	14.20	*14,425,527	85.80	984,000	5.85
Fire Association of Philadelphia	Pennsylvania	13,667,122	1,773,000	12.97	*11,894,122	87.03	944,000	6.91
Fireman's Fund Insurance Company	California	25,382,122	6,715,000	26.46	*18,667,122	73.54	1,491,000	5.65
Firemen's Insurance Company	New Jersey	16,331,059	1,665,000	10.20	*14,666,059	89.80	562,000	3.44
First American Fire Insurance Company	New York	2,723,487	381,000	13.99	*2,342,487	86.01	268,000	9.84
Franklin Fire Insurance Company	Pennsylvania	8,963,212	1,812,000	20.22	7,151,212	79.78	632,000	7.05
Franklin National Insurance Company of New York	New York	1,912,600	292,000	15.27	*1,620,600	84.73	141,000	7.37
The Fulton Fire Insurance Company	New York	1,217,957	119,000	9.77	1,098,957	90.23	227,000	18.64
Georgia Home Insurance Company	Georgia	862,760	158,000	18.31	704,760	81.69	228,000	26.43
The Gibraltar Fire and Marine Insurance Company	New York	2,217,280	101,000	4.56	2,116,280	95.44	842,000	37.97
Girard Fire and Marine Insurance Company	Pennsylvania	2,876,555	251,000	8.73	*2,625,555	91.27	245,000	8.52
Glens Falls Insurance Company	New York	12,155,005	4,803,000	39.51	*7,352,005	60.49	801,000	6.59
Globe & Republic Insurance Company of America	Pennsylvania	2,260,967	360,000	15.92	*1,900,967	84.08	79,000	3.49
Globe and Rutgers Fire Insurance Company	New York	3,161,644	856,000	27.07	*2,305,644	72.93	324,000	10.25
Granite State Fire Insurance Company	New Hampshire	1,920,280	286,000	14.89	*1,634,280	85.11	144,000	7.50
Great American Insurance Company	New York	13,355,195	2,546,000	19.06	*10,809,195	80.94	964,000	7.22
The Halifax Insurance Company	Canada	597,095			597,095	100.00	13,000	2.18

*Includes some direct writings in foreign countries.

Hanover Fire Insurance Company	New York	8,217,457	1,176,000	14.31	*7,041,457	85.69	480,000	5.84
Hartford Fire Insurance Company	Connecticut	37,184,966	559,000	1.50	*36,625,966	98.50	3,379,000	9.09
Home Fire and Marine Insurance Company	California	3,433,086	577,000	16.81	*2,856,086	83.19	282,000	8.21
The Home Insurance Company	New York	43,886,758	8,766,000	19.97	*35,120,758	80.03	3,159,000	7.20
The Homeland Insurance Company of America	New York	2,019,299	203,000	10.05	1,816,299	89.95	222,000	10.99
The Homestead Fire Insurance Company	Maryland	1,902,941	306,000	16.08	*1,596,941	83.92	359,000	18.87
Imperial Assurance Company	New York	1,275,318	104,000	8.15	*1,171,318	91.85	77,000	6.04
Insurance Company of North America	Pennsylvania	32,450,471	4,242,000	13.07	*28,208,471	86.93	1,409,000	4.34
The Insurance Company of the State of Pennsylvania	Pennsylvania	2,779,227	281,000	10.11	2,498,227	89.89	302,000	10.87
Jersey Insurance Company of New York	New York	2,474,783	378,000	15.27	*2,096,783	84.73	205,000	8.28
Knickerbocker Insurance Company of New York	New York	1,859,122	374,000	20.12	*1,485,122	79.88	120,000	6.45
Lafayette Fire Insurance Company	Louisiana	†189,715	110,000	57.98	79,715	42.02	None	----------
Law Union and Rock Insurance Company, Ltd	London	797,502	----------	----------	797,502	100.00	60,000	7.52
The Liverpool and London and Globe Insurance Co., Ltd	England	9,563,722	----------	----------	*9,563,722	100.00	788,000	8.24
The London and Lancashire Insurance Company, Ltd	England	3,402,827	----------	----------	3,402,827	100.00	281,000	8.26
London and Provincial Marine and General Insurance Co., Ltd.	England	273,858	----------	----------	273,858	100.00	2,000	.73
London and Scottish Assurance Corporation, Ltd	Unknown	616,020	----------	----------	616,020	100.00	93,000	15.10
The London Assurance	England	3,614,083	----------	----------	3,614,083	100.00	240,000	6.64
Lumbermen's Insurance Company	Pennsylvania	1,362,737	284,000	20.84	*1,078,737	79.16	85,000	6.24
The Manhattan Fire and Marine Insurance Company	New York	1,589,518	214,000	13.46	1,375,518	86.54	106,000	6.67
Marine Insurance Company, Limited	England	1,543,320	----------	----------	1,543,320	100.00	15,000	.97
Maryland Insurance Company	Delaware	1,177,145	----------	----------	*1,177,145	100.00	80,000	6.80
Massachusetts Fire and Marine Insurance Company	Massachusetts	1,241,323	105,000	8.46	1,136,323	91.54	135,000	10.88
Mechanics and Traders Insurance Company	Connecticut	1,464,662	31,000	2.12	1,433,662	97.88	208,000	14.20
The Mercantile Insurance Company of America	New York	2,571,838	554,000	21.54	2,017,838	78.46	141,000	5.47
Merchants and Manufacturers Insurance Company of New York	New York	1,505,155	221,000	14.68	*1,284,155	85.32	70,000	4.65
Mercury Insurance Company	Minnesota	1,993,519	114,000	5.72	*1,879,519	94.28	114,000	5.72
Michigan Fire and Marine Insurance Company	Michigan	2,489,540	693,000	27.84	*1,796,540	72.16	134,000	5.38
Milwaukee Mechanics' Insurance Company	Wisconsin	5,400,238	233,000	4.31	*5,167,238	95.69	271,000	5.02
Minneapolis Fire and Marine Insurance Company	Minnesota	1,209,640	181,000	14.96	1,028,640	85.04	80,000	6.61
National-Ben Franklin Fire Insurance Company	Pennsylvania	2,701,412	484,000	17.91	*2,217,412	82.08	167,000	6.18

*Includes some direct writings in foreign countries.

Total direct premium writings during the year 1941 compared with direct writings in the State of incorporation and in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia—Continued

Company	State of incorporation	Premium income (fire and allied lines)	Premium income from home State	Percent derived from home State	Premium income from other States	Percent derived from other States	Premium income from S. E. U. A. territory	Percent derived from S. E. U. A. territory
National Fire Insurance Company of Hartford	Connecticut	$19,103,475	$745,000	3.90	*$18,358,475	96.10	$1,221,000	6.39
National Liberty Insurance Company of America	New York	9,068,523	1,663,000	18.58	*7,375,523	81.42	596,000	6.58
National Security Insurance Company	Nebraska	1,562,767	182,000	11.65	*1,380,767	88.35	144,000	9.21
National Union Fire Insurance Company	Pennsylvania	12,046,831	1,905,000	15.81	*10,141,831	84.19	1,325,000	11.00
Netherlands Insurance Company, Est. 1845	Unknown	432,724			432,724	100.00	21,000	4.85
Newark Fire Insurance Company	New Jersey	3,162,155	411,000	13.00	*2,751,155	87.00	82,000	2.59
The New Brunswick Fire Insurance Company	New Jersey	2,490,689	236,000	9.48	*2,254,689	90.52	539,000	21.64
New England Fire Insurance Company	Massachusetts	1,876,866	93,000	4.96	*1,783,866	95.04	164,000	8.74
New Hampshire Fire Insurance Company	New Hampshire	5,957,058	522,000	8.76	*5,435,058	91.24	467,000	7.84
New York Fire Insurance Company	New York	2,737,739	500,000	18.26	*2,237,739	81.74	181,000	6.61
New York Underwriters Insurance Company	New York	6,021,609	606,000	10.06	*5,415,609	89.94	686,000	11.39
Niagara Fire Insurance Company	New York	7,059,026	1,174,000	16.63	*5,885,026	83.37	348,000	4.93
North British and Mercantile Insurance Company, Ltd	England	7,114,844			*7,114,844	100.00	515,000	7.24
The North Carolina Home Insurance Company	North Carolina	357,082	271,382	76.00	85,700	24.00	271,382	76.00
The Northern Assurance Company, Limited	England	4,437,575			4,437,575	100.00	434,000	9.78
Northern Insurance Company of New York	New York	6,253,604	1,312,000	20.98	4,941,604	79.02	181,000	2.89
The North River Insurance Company	New York	6,999,324	1,116,000	15.94	5,883,324	84.06	573,000	8.19
Northwestern Fire and Marine Insurance Company	Minnesota	2,646,127	318,000	12.02	2,328,127	87.98	343,000	12.96
Northwestern National Insurance Company	Wisconsin	6,033,141	467,000	7.74	5,566,141	92.26	102,000	1.69
Norwich Union Fire Insurance Society, Ltd	England	2,796,774			2,796,774	100.00	253,000	9.05
Occidental Insurance Company	California	1,737,607	190,000	10.93	1,547,607	89.07	156,000	8.98
Old Colony Insurance Company	Massachusetts	1,958,418	320,000	16.34	*1,638,418	83.66	292,000	14.91
Orient Insurance Company	Connecticut	2,679,625	92,000	3.43	2,587,625	96.57	206,000	7.69
The Pacific Coast Fire Insurance Company	Canada	333,295			333,295	100.00	28,000	8.40

*Includes some direct writings in foreign countries.

Pacific Fire Insurance Company	New York	5,978,855	838,000	14.02	*5,140,855	85.98	521,000	8.71
Pacific National Fire Insurance Company	California	6,098,649	1,535,000	25.17	4,563,649	74.83	269,000	4.41
Palatine Insurance Company, Ltd	England	995,779			995,779	100.00	278,000	27.92
Paramount Fire Insurance Company	New York	793,260	35,000	4.41	758,260	95.59	102,000	12.86
Patriotic Insurance Company	New York	1,196,336	252,000	21.06	944,336	78.94	132,000	11.03
The Paul Revere Fire Insurance Company	New York	1,681,737	302,000	17.96	1,379,737	82.04	100,000	5.95
The Pennsylvania Fire Insurance Company	Pennsylvania	6,426,093	1,090,000	16.96	*5,336,093	83.04	381,000	5.93
Philadelphia Fire and Marine Insurance Company	Pennsylvania	3,083,660	500,000	16.21	*2,583,660	83.79	289,000	9.37
Philadelphia National Insurance Company	Pennsylvania	452,045	40,000	8.85	412,045	91.15	47,000	10.40
Phoenix Assurance Company, Limited, of London	England	4,346,335			4,346,335	100.00	311,000	7.16
The Phoenix Insurance Company	Connecticut	9,794,209	272,000	2.78	*9,522,209	97.22	559,000	5.71
Piedmont Fire Insurance Company	North Carolina	2,011,601	411,000	20.43	1,600,601	79.57	654,000	32.51
The Potomac Insurance Company of the District of Columbia	District of Columbia	3,052,209	37,000	1.21	*3,015,209	98.79	102,000	3.34
Providence Washington Insurance Company	Rhode Island	8,723,757	476,000	5.46	*8,247,757	94.54	791,000	9.07
Provident Fire Insurance Company	New Hampshire	1,362,681	83,000	6.09	1,279,681	93.91	135,000	9.91
Queen Insurance Company of America	New York	9,457,436	1,825,000	19.30	*7,632,436	80.70	537,000	5.68
The Reliance Insurance Company of Philadelphia	Pennsylvania	1,482,537	108,000	7.28	1,374,537	92.72	227,000	15.31
Richmond Insurance Company of N. Y.	New York	1,158,564	229,000	19.77	*929,564	80.23	124,000	10.70
Rochester American Insurance Company	New York	1,700,860	205,000	12.05	1,495,860	87.95	287,000	16.87
Royal Exchange Assurance	England	3,292,167			3,292,167	100.00	176,000	5.35
Royal Insurance Company, Limited	England	10,576,365			*10,576,365	100.00	852,000	8.06
Safeguard Insurance Company	New York	838,047	84,000	10.02	754,047	89.98	91,000	10.86
St. Paul Fire and Marine Insurance Company	Minnesota	19,534,080	988,000	5.06	*18,546,080	94.94	913,000	4.67
Scottish Union and National Insurance Company	Unknown	2,870,809			2,870,809	100.00	160,000	5.57
Seaboard Fire and Marine Insurance Company of New York, N. Y.	New York	1,859,078	222,000	11.94	*1,637,078	88.06	79,000	4.25
Seaboard Insurance Company	Maryland	438,128	124,000	28.30	314,128	71.70	33,000	7.53
The Sea Insurance Company, Limited	England	3,347,707			3,347,707	100.00	21,000	.63
Security Insurance Company of New Haven	Connecticut	5,850,471	386,000	6.60	*5,464,471	93.40	330,000	5.64
Sentinel Fire Insurance Company	Massachusetts	1,913,434	132,000	6.90	*1,781,434	93.10	388,000	20.27
Southern Fire Insurance Company	North Carolina	955,759	408,000	42.69	*547,759	57.31	524,000	54.83
Springfield Fire and Marine Insurance Company	Massachusetts	12,295,083	795,000	6.47	*11,500,083	93.53	801,000	6.51

*Includes some direct writings in foreign countries.

Total direct premium writings during the year 1941 compared with direct writings in the State of incorporation and in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia—Continued

Company	State of incorporation	Premium income (fire and allied lines)	Premium income from home State	Percent derived from home State	Premium income from other States	Percent derived from other States	Premium income from S. E. U. A. territory	Percent derived from S. E. U. A. territory
The Standard Fire Insurance Company	Connecticut	$3,272,974	$177,000	5.41	$3,095,974	94.59	$285,000	8.71
The Standard Fire Insurance Company of New Jersey	New Jersey	1,276,620	277,000	21.70	999,620	78.30	36,000	2.82
Standard Insurance Company of New York	New York	4,491,452	797,000	17.74	*3,694,452	82.26	291,000	6.48
Star Insurance Company of America	New York	2,092,118	394,000	18.83	1,698,118	81.17	165,000	7.89
Sun Insurance Office, Ltd	England	5,281,737			5,281,737	100.00	531,000	10.05
Sun Underwriters Insurance Company	New York	679,561	106,000	15.60	573,561	84.40	132,000	19.42
Transcontinental Insurance Company	New York	1,892,496	448,000	23.67	*1,444,496	76.33	127,000	6.71
The Travelers Fire Insurance Company	Connecticut	17,839,028	672,000	3.78	*17,167,028	96.22	1,245,000	6.98
Twin City Fire Insurance Company	Minnesota	1,258,306	113,000	8.98	1,145,306	91.02	120,000	9.54
Union Assurance Society, Limited	England	724,617			724,617	100.00	90,000	12.42
Union Insurance Society of Canton, Limited	Hong Kong	850,935			850,935	100.00	3,000	.35
The Union Marine & General Insurance Company, Limited	England	1,420,867			1,420,867	100.00	45,000	3.17
United Firemen's Insurance Company of Philadelphia	Pennsylvania	1,937,987	121,000	6.24	*1,816,987	93.76	170,000	8.77
United States Fire Insurance Company	New York	14,656,058	3,237,000	22.09	*11,419,058	77.91	914,000	6.24
Vigilant Insurance Company	New York	344,857	164,000	66.98	80,857	33.02	24,000	9.80
Virginia Fire and Marine Insurance	Virginia	674,958	231,000	34.22	443,958	65.78	370,000	54.81
Westchester Fire Insurance Company	New York	11,513,729	3,615,000	31.40	*7,898,729	68.60	589,000	5.12
Western Assurance Company	Canada	1,255,236			1,255,236	100.00	291,000	23.18
Western Fire Insurance Company	Kansas	917,612	85,000	9.26	832,612	90.74	none	

*Includes some direct writings in foreign countries.

The World Fire and Marine Insurance Company	Connecticut	3, 889, 046	175, 000	4. 50	*3, 714, 046	95. 50	732, 000	18. 82
Yorkshire Insurance Company, Limited	England	2, 492, 555			2, 492, 555	100. 00	185, 000	7. 42
Totals		$866, 764, 876	$109, 721, 392	12. 37	$777, 043, 484	87. 63	$66, 982, 636	7. 78

Source: Best's Insurance Reports, Fire and Marine Edition, 1942.

*Includes some direct writings in foreign countries.

†The direct writings of this company as shown by *Best's Insurance Reports, Fire and Marine Edition, 1942*, are the income for the year 1940.

NOTE: The distribution of direct writings by states is not available for thirteen appellee companies. No information is published in *Best's Insurance Reports* with reference to the detail of operations of the Catawba Insurance Company, South Carolina. The net premiums written during 1941 are as follows for twelve appellee companies:

Company	State of Incorporation	Net Premiums Written
Atlantic Fire Insurance Company	North Carolina	.....
Bankers Fire and Marine Insurance Company	Alabama	$55, 152
Birmingham Fire Insurance Company	Alabama	794, 367
Eastern Shore of Virginia Fire Insurance Company, Inc	Virginia	56, 201
Old Dominion Fire Insurance Company	Virginia	34, 404
Rhode Island Insurance Company	Rhode Island	2, 798, 325
South Carolina Insurance Company	South Carolina	779, 703
Southeastern Fire Insurance Company	South Carolina	.....
Southern Fire and Marine Insurance Company of Georgia	Georgia	27, 876
Standard Marine Insurance Company, Limited	England	2, 188. 678
The State Assurance Company, Limited	England	709. 613
Stonewall Insurance Company	Alabama	57, 864
Total		$7, 891, 183

U. S. GOVERNMENT PRINTING OFFICE: 1943

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 354

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

REPLY MEMORANDUM FOR THE UNITED STATES

This memorandum is filed pursuant to permission granted by the Court at the oral argument. It will cover matters not considered in the Government's main brief and points raised during the argument.

1. *The construction of the indictment with respect to the allegations as to interstate commerce in other industries.* Appellees argue that the indictment, as construed by the court below alleged only restraints upon interstate commerce in fire insurance itself and not upon commerce in other industries, and that therefore the Government's case must fall if the fire insurance business is not in interstate commerce. We think that the case

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can stand entirely as it relates to restraints upon the interstate commerce of the fire-insurance companies, and the greater part of our main brief is devoted to that proposition. Indeed, Count 2 of the indictment charges only "a conspiracy to monopolize trade and commerce in fire insurance" (R. 13). Count 1, however, in paragraph 21, charges that appellees (R. 10–11)—

> * * * have engaged knowingly and continuously in a conspiracy to fix and maintain arbitrary and noncompetitive premium rates on fire insurance sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, which conspiracy has been in restraint of *the interstate trade and commerce described in this indictment*, in violation of section 1 of * * * the Sherman Act.

Paragraph 24, entitled "effect of the conspiracy," alleges that the action of the appellees has had the intended effect (R. 12)—

> * * * of unlawfully suppressing competition in the sale of fire insurance, of preventing the determination by free and competitive practices of premium rates on fire insurance sold by defendants, of arbitrarily controlling and fixing *noncompetitive premium rates on fire insurance*, in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, *and* have had the effect *thereby of restrain-*

ing the interstate trade and commerce described in this indictment, in violation of section 1 of the Sherman Act.

The differentiation between the allegations in Count 2, which deals only with "commerce in fire insurance," and those in Count 1, which deals with the "commerce described in the indictment," cannot be disregarded or treated as meaningless.

The final paragraph of Count 1 does, it is true, state that the conspiracy restrains and burdens "interstate trade and commerce in fire insurance" (R. 13). But this paragraph is only the customary formal conclusion to the count, and it cannot be said to negative the specific description of the conspiracy and its effects in paragraphs 21 and 26.

We then come to the question as to what constitutes the "interstate trade and commerce described in this indictment." Paragraphs 13–20 are entitled "Nature of Trade and Commerce Involved." In addition to the allegations relating to the insurance companies' own business, paragraph 14 alleges that the properties insured include "airplane hangars, auto garages, steamboats, tugs, and ferries * * * shipyards, warehouses and terminals, trucks and busses, railroad equipment and rolling stock, and goods, wares, and merchandise of all types carried in transit in interstate and foreign commerce by motor vehicles, railroads, airplanes, and other media of transportation."

Paragraph 15 states that fire insurance "is essential to and directly affects the flow of interstate commerce" and then avers that—

> Goods, wares, and merchandise of all kinds, to the value of millions of dollars, are constantly moving in the current of interstate commerce.

The commerce described in the quoted passages constitutes interstate trade or commerce "described in the indictment." A combination to fix the rates of fire insurance upon goods in commerce and instrumentalities of commerce increases the cost of and thereby restrains commerce in such goods or instrumentalities. Cf. *Local 167* v. *United States*, 291 U. S. 293; *Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255. Appellees assert that the court below constructed the indictment as alleging only a restraint on trade and commerce in fire insurance, and that under the Criminal Appeals Act this Court is bound by the construction of the indictment adopted by the district court. The latter proposition is correct, and we do not deny that if the court below did interpret the indictment in the manner suggested, this Court would be bound by that construction. But we do not think that the court below purported to or did construe the indictment.

Appellees (Br. p. 4) refer only to three sentences as showing a construction of the indictment. The first sentence (R. 17) contains merely a very general summary of the indictment as

charging a conspiracy to fix noncompetitive rates "on fire insurance" in Count 1 and a conspiracy "to monopolize trade and commerce in fire insurance" in Count 2. This sentence cannot fairly be regarded as an interpretation of the indictment. Insofar as Count 1 is concerned, the summary does not indicate what commerce is being restrained.

The next sentence quoted by appellees (R. 17) declares that "the restraint and monopoly denounced must be that of interstate trade or commerce" or the indictment must fall. This is a mere statement of a correct conclusion of law, not a construction of the indictment.

This last passage cited by appellees is the sentence at the end of R. 17. The court there said:

> It is not a question here of whether the defendants participated in some incidental way in interstate commerce or used in some instances the facilities of interstate commerce, but is rather whether the activities complained of as constituting the business of insurance would themselves constitute interstate trade or commerce, and whether defendants' method of conducting same amounted to restraint or monopoly of same (R. 18).

The language suggests that the court was thinking in the same terms as the legal discussion in *Hooper* v. *California*, 155 U. S. 648, 655, and *New York Life Insurance Co.* v. *Deer Lodge County*,

231 U. S. 495, 508–509, with respect to the non-essential nature of the use of the facilities of interstate commerce. The sentence seems to say only that the Court is of the view that the *question presented* is not whether the appellees participated incidentally in interstate commerce or used its facilities, but whether the insurance business itself constituted commerce. This statement of the issue does not seem to be a construction of the indictment. It is entirely consistent with the view that the Court thought the allegations as to other industries irrelevant to the legal question; if that were the meaning of the opinion, the issue of relevance would raise a question as to the construction of the statute, not one as to the interpretation of the indictment.

The opinion as a whole does not seem to be directed in any way at the construction of the indictment. The discussion relates entirely to the meaning of the statute, and the court's limitation of the issue to the business of the appellees seems to be predicated upon its notion that the allegations as to other industries were of no legal consequence. Inasmuch as the Sherman Act clearly applies to intrastate restraints upon the interstate conduct of others (*United States* v. *Patten*, 226 U. S. 293), such a position would seem to be a misconstruction of the statute rather than an interpretation of the indictment.

We do not think that the court below would have "construed" Count 1 of the indictment, in

disregard of its language, without at least indicating that it was dealing with a problem of construction. An intention to adopt such a construction cannot fairly be read into the opinion. Accordingly, we do not think that the opinion below attempts to construe the indictment at all, or that the indictment has any other meaning than that which its language suggests.

2. Appellees attempt to minimize the insurance on goods and things in commerce by asserting that only four percent of the premiums written in the six Southeastern states is "inland marine" insurance. All fire insurance on things in commerce is not inland marine—but even if it were, and if the percentage were as suggested, fire insurance would still, as alleged (R. 9), be essential to all goods moving in interstate commerce. A restraint which affects *all* interstate freight movements can hardly be regarded as insubstantial, even though it may also affect other matters to a greater degree.

3. In view of a question asked by the Chief Justice, we believe that we should state that it is our position that a combination of fire insurance companies to fix rates both restrains interstate commerce in the commodities or objects insured and the competition in interstate commerce of the insurance companies themselves. Insofar as the latter is concerned, the companies are unquestionably engaged in such commerce, and if they agreed not to compete and attempt to force others not to compete with them, the busi-

ness in which they are engaged is restrained within the meaning of the antitrust law.

The fire insurance contract is not to be regarded as merely the making of a local agreement, but as one to be performed by the payment of money by the insured to the company across state lines, and if there is a loss, by the payment from the company to the insured of money across state lines. The fact that payment is made through an agent does not make performance of a contract any the less interstate. Thus a restraint on competition in the sale of fire insurance is a restraint on freedom in making contracts to be performed in interstate commerce, and since the companies are in the business of performing and facilitating the performance of such contracts, a restraint affecting the contracts is a restraint on the entire business of the companies.

Furthermore, the indictment alleges that appellees conspired to exclude from the fire insurance business companies not members of the Association. If any part of the activities of such companies is interstate—whether the interstate transmission of funds or the interstate communications which are essential to the existence of the business—the exclusion of such companies from such interstate business is undoubtedly a restraint of interstate commerce. This aspect of the case does not depend at all upon whether the contract is interstate, but merely upon whether any portion

of an insurance company's activities are interstate.

4. Questions from the bench during the argument raised the problem as to the effect of a decision that the insurance business is in interstate commerce upon state laws which require insurance companies to obtain a license in order to do business within a state. It is true that a company doing an exclusive interstate commerce business may not be required to obtain permission to do business in a state. *E. g., Pacific Tel. & Tel. Co.* v. *Washington,* 297 U. S. 403; *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218. This does not mean, however, that states may not use the device of licensing as a means of enforcing reasonable regulations under the police power even as to interstate commerce. Thus a state has the power to prevent property from coming across its borders in interstate commerce when necessary to protect the public health and welfare. *Mintz* v. *Baldwin,* 289 U. S. 346. Closely in point here are the Blue Sky Law cases. *Hall* v. *Geiger-Jones Company,* 242 U. S. 539; *Caldwell* v. *Sioux Falls Stockyards Co.,* 242 U. S. 559; *Merrick* v. *Halsey and Co.,* 242 U. S. 568. In those cases, companies selling securities from other states were required to obtain a state license, conditioned upon compliance with reasonable regulation adopted for the purpose of protecting the states' citizens against fraud. If a license

system is not used to exclude foreign corporations from a state but as a means of compelling compliance with regulations which could have been directly imposed without being an undue burden on interstate commerce, the use of a licensing device need not be fatal in itself.

We think that state insurance regulations fall in that category. As the insurance cases themselves demonstrate, the states do not seek actually to prohibit foreign insurance companies from entering the state, but require corporations wishing to do business within the state to comply with conditions which serve legitimate regulatory or taxing functions. To the extent that the conditions would be valid, we see no reason why state laws should be condemned because of the nature of the sanction employed.

The underlying test as to the validity of state legislation affecting interstate commerce is whether it imposes an undue burden (*California* v. *Thompson*, 313 U. S. 109, and cases cited), and that must be determined as a matter of substance in the particular case and not by the form in which the statute is drawn or by any other mechanical formula. Cf. *Parker* v. *Brown*, 317 U. S. 341, 362; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 505.

5. The question was asked as to whether construction of the Sherman Act as reaching intra-

state transactions "affecting" interstate commerce would not indicate that the use of the word "affect" was superfluous in other commerce regulations. The Sherman Act, however, applies not to practices *in* interstate commerce—as did the provision of the Federal Trade Commission Act considered in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349—but to "restraints of" such commerce. Commerce may be restrained by intrastate transactions, as this Court has often held. See cases cited in the Government's main brief, pp. 66–67, 81–82. Thus to hold that the Sherman Act goes to the limits of the commerce power as to the type of restraint with which it deals indicates only that when a statute uses the word "restrain" as distinct from "in", it need not also say "affect".

6. The excerpts from the opinions of Judge Learned Hand in *Thames & Mersey Marine Insurance Co.* v. *United States*, 217 [redacted]. 683, 685, referred to in the oral argument, are as follows:

> In passing I may state that I cannot regard the cases relied upon by the United States and holding that the usual insurance business is intrastate as at all in point. None of those cases involved the insurance of goods in interstate commerce, and Congress may well have control over such contracts. The grant of power over interstate commerce is not to be confused with the clause here in question (p. 684).

I said in the other opinion that none of the insurance cases concerned only insurance on goods in transit. In this I was wrong. *Hooper* v. *California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, dealt with a tax upon the business of marine insurance in San Francisco. Some of the marine insurance written in that city is, I suppose, upon coastwise trade to Eureka on the north and Santa Cruz and San Diego on the south; but the immense mass of it must be either to foreign ports or to Oregon and Washington. In any event, no such distinction was taken; but the case went squarely upon the theory that taking insurance upon foreign or interstate trade was not itself foreign or interstate business.

The prohibition against taxing exports has been treated as analogous to the prohibition on the states against regulating interstate trade. It is not, perhaps, necessary to say whether the cases are precisely the same. It is enough that the reasoning in *Hooper* v. *California, supra*, presupposes, without expressly deciding, that it is the same, and that if the business was interstate the tax was void. Certainly at that time that was the accepted doctrine.

I need not consider whether there is today a zone in which the states may act till Congress intervene, and whether a state might not tax a business which Congress could regulate. *Hooper* v. *California, supra*, seems to me directly to support the defendant (p. 686).

7. The Act providing for the issuance of marine insurance policies by a Bureau of War Risk Insurance in the Treasury Department (c. 293, 38 Stat. 711, repealed 43 Stat. 629) begins as follows:

> Whereas the foreign commerce of the United States is now greatly impeded and endangered through the absence of adequate facilities for the insurance of American vessels and their cargoes against the risks of war; and
>
> Whereas it is deemed necessary and expedient that the United States shall temporarily provide for the export shipping trade of the United States adequate facilities for the insurance of its commerce against the risks of war: * * *

It should be observed that this Act was passed on September 2, 1914, before the United States entered the war, and on its face purported to be an exercise of the commerce and not the war powers.

8. In their brief (pp. 59–60) and argument, in order to prove the effectiveness of state regulation in preventing excessive insurance rates, appellees stated that the average fire insurance premium rate dropped from $1.15 per hundred dollars for the period 1900–1909 to $.61 in 1942, a reduction of nearly 50%. Appellees did not state that the very table they cite (The Weekly Underwriter, *Record of Fire Insurance by States for 1942* (1943), p. 124) shows that during the same period losses paid on the insurance written de-

creased from $.65 per hundred dollars to $.23, or 64.6% as compared to 47%. We think all this irrelevant, but believe that the entire picture and not merely part of it should be before the Court.

Respectfully submitted,

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No. 354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA,
Appellant,

v.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, *ET AL.*,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEES

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National Convention of Insurance Commissioners, Proceedings, 1923 Meeting 46, 47

Patterson, *The Insurance Commissioner in the United States* (1927) 35, 37, 49

Pink, *The Problem of Fire Rates* (1942) 40, 69

Republican Platform 28

Riegel, *Fire Underwriters Association in the United States* (1916) 59

Spectator, The, *Fire Insurance Laws, Taxes and Fees*, 1942-1943 (1942) 13, 48

Wade, Insurance Commissioner 43

Wandel, *The Control of Competition in Fire Insurance* (1935) 37

Weekly Underwriter, The, *Record of Fire Insurance by States for* 1942 (1943) 13, 60, 87

Zartman & Price, *Property Insurance* (1921) 90

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

THE UNITED STATES OF AMERICA, Appellant, *vs.* SOUTH-EASTERN UNDERWRITERS ASSOCIATION, *et al.*, Appellees.	No. 354.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR APPELLEES.

The indictment in the instant case charges conspiracy —to restrain and monopolize *commerce* in fire insurance— in violation of Sections 1 and 2 of the Sherman Act.

The District Court dismissed the indictment.

The Government appeals from this dismissal.

Opinion Below.

The opinion below, setting forth the grounds for this dismissal, is reported in 51 F. Supp. 712 (R. 17-20, incl.).

Jurisdiction.

The Government invokes the jurisdiction of this Court under the Act of March 2, 1907, Chap. 2564, 34 Stat. 1246 as amended by the Act of May 9, 1942, Chap. 295, Sec. 1, 56

Stat. 271, 18 U. S. C. 682, known as the Criminal Appeals Act; and Judicial Code Sec. 238, 28 U. S. C. Sec. 345.

The Government's petition for appeal was filed in the court below on August 30, 1943 and an order of that court allowing such appeal was filed on the same day (R. 21, 22).

The record on appeal was filed herein on September 15, 1943 and an order of this Court noting probable jurisdiction was thereafter entered on October 25, 1943 (R. 24).

Question Presented.

The sole issue here presented is a question of law.

This issue is whether fire insurance *in and of itself* is interstate *commerce*[1] within the meaning of the Sherman Anti-Trust Act.

The court below has so construed the indictment.

The indictment.

The indictment dismissed below contains two Counts.

Count One charges that the defendants have engaged "in a conspiracy to fix and maintain arbitrary and non-competitive premium rates *on fire insurance*[2] sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, which conspiracy has been in restraint of the interstate trade and commerce described in this indictment in violation of section 1 of * * * the Sherman Act" (par. 21; R. 10-11 incl.).[3] This Count then purports to

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[1] The word "commerce", having a meaning roughly synonymous with "trade" when used in Sections 1 and 2 of the Sherman Act, is herein used to denote both "trade" and "commerce". See *Atlantic Cleaners & Dyers, Inc. et al.* v. *United States*, 286 U. S. 427, 434 (1932); *Apex Hosiery Co.* v. *Leader et al.*, 310 U. S. 469, 494, 495 (1940).

[2] Italics ours throughout unless otherwise indicated.

[3] Paragraph references are to paragraphs in the indictment.

set forth certain of the terms of the alleged conspiracy, including the establishment of rates and acts ancillary thereto (pars. 22-23 incl.) and avers that said terms and the concerted action of the defendants pursuant to the conspiracy have suppressed competition in fire insurance (par. 24; R. 11-12 incl.).

The Count then concludes that the defendants have engaged in an "unlawful conspiracy to restrain, obstruct, and burden *interstate trade and commerce in fire insurance* * * *" (par. 26; R. 12-13 incl.).

Count Two charges that the defendants have engaged "in a conspiracy to monopolize trade and commerce *in fire insurance* in and among the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia in violation of section 2 of * * * the Sherman Act" (par. 28; R. 13). The indictment then purports to set forth certain of the terms of the alleged conspiracy, including the establishment of rates and acts ancillary thereto (pars. 29-30) and claims that said terms and the concerted action of the defendants pursuant to the conspiracy have furthered monopolization of fire insurance (par. 31; R. 13-14 incl.).

The Count finally concludes with the averment that the defendants have engaged in an "unlawful conspiracy to monopolize *interstate trade and commerce in fire insurance*" (par. 33; R. 15).

Construction of indictment.

The District Court construed this indictment, in conformity with its terms, as charging that the business of fire insurance, *in and of itself*, is interstate *commerce* within the meaning of the Sherman Act and as charging that the alleged conspiracies to restrain and to monopolize *that commerce* had violated the Act.

The lower court's construction appears in the following excerpt from its opinion:

> "On November 20, 1942, an indictment was returned by a Grand Jury of this Court against one hundred and ninety-eight corporations and twenty-seven individuals, charging such corporations and individuals with a conspiracy to fix and maintain arbitrary and non-competitive *rates on fire insurance* sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, in violation of Section 1 of the Sherman Anti-Trust Act, 26 Stat. 209, and with a conspiracy to monopolize *trade and commerce in fire insurance* in said States in violation of Section 2 of the Act.
>
> • • • • • •
>
> "To constitute a violation of the Sherman Act, the restraint and monopoly denounced must be that of interstate trade or commerce, and, unless the restraint and monopoly charged in the indictment be restraint or monopoly of interstate trade or commerce, the indictment must fall.
>
> "It is not a question here of whether the defendants participated in some incidental way in interstate commerce or used in some instances the facilities of interstate commerce, but is rather whether the activities complained of as constituting the business of insurance *would themselves constitute interstate trade or commerce,* and whether defendants' method of conducting same amounted to restraint or monopoly of *same*" (R. 17-18).

This construction controlling.

The District Court's construction of the indictment, namely that it charges a restraint and monopoly solely of *commerce* in fire insurance, and not a restraint and monopoly of fire insurance affecting *other* commerce, in violation of the Sherman Act, is of course here controlling.

This Court has always considered itself bound on such appeals under the Criminal Appeals Act by the lower court's construction of the indictment.

In *United States* v. *Borden Company et al.*, 308 U. S. 188, for example, involving an appeal by the Government from a judgment of a District Court sustaining demurrers to an indictment under the Sherman Act, this Court squarely ruled that:

> "This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review" (p. 193).

See also:

United States v. *Colgate & Company*, 250 U. S. 300;
United States v. *Yuginovich et al.*, 256 U. S. 450;
United States v. *Winslow*, 227 U. S. 202;
United States v. *Patten*, 226 U. S. 525.

Issues sought to be raised by Government brief.

The issue raised by the indictment, namely whether fire insurance is, in and of itself, interstate *commerce* within the meaning of the Sherman Act, is thus much narrower than the two issues now attempted to be raised in the Government's brief.

The issue here presented is *not* that discussed in Point I of the Government brief (p. 13, *et seq.*), namely whether:

> "Appellees' fire insurance business is subject to the federal commerce power."

The indictment nowhere puts in issue the broad question of whether Congress *could* on any theory regulate fire insurance. It charges merely that one Act of Congress, namely the Sherman Act, applies to fire insurance in the manner

alleged in the indictment. The issue is not what Congress *could* do but what it *has* done.

The issue here presented likewise is *not* that discussed in Point II of the Government brief (p. 69, *et seq.*), namely whether:

> "The insurance business is subject to the Sherman Act."

The indictment as construed below nowhere puts in issue the broad question of whether the Sherman Act *could* on any theory apply to fire insurance. It charges that fire insurance is, in and of itself, interstate commerce within the meaning of the Sherman Act and thus subject to that Act—not whether fire insurance could possibly be reached by the Act on some unspecified theory that it burdens or restrains other activities that are commerce.

Furthermore, two general statements are made in the Government's brief with respect to the issue in this case (p. 70, footnote 88, and pp. 99-123) which require correction. We wish to make plain that:

a) Defendants, in contending that fire insurance is not interstate commerce within the meaning of the Sherman Act, mean just that. We submit that fire insurance is neither (1) commerce nor (2) interstate.

b) Defendants, in contending that fire insurance is not interstate commerce within the meaning of the Sherman Act, are not seeking statutory exemption under the "rule of reason". As we stated in our brief below—"This is an issue more properly presented during a trial than on demurrer."

Argument.

Defendants respectfully submit that fire insurance, in and of itself, is not interstate *commerce* within the meaning of the Sherman Act.

Defendants specifically submit, in support of the dismissal of the indictment below, that:

1. This Court should not repudiate its uniform decisions of the past 75 years that fire insurance is not commerce.

2. Congress has accepted and approved the Supreme Court decisions that fire insurance is not commerce.

3. The States have curtailed competition in fire insurance in reliance upon the Supreme Court decisions that fire insurance is not commerce.

4. This Court will unsettle the law applicable to fire insurance and expose defendants to retroactive criminal penalties if it now holds that fire insurance is commerce.

5. The power of Congress to regulate fire insurance is not here at issue.

I.

This Court Should Not Repudiate Its Uniform Decisions Of The Past 75 Years That Fire Insurance Is Not Commerce.

Government argument.

The Government argues in its brief that fire insurance is "commerce", and thus "commerce" subject to the Sherman Act, but cites no cases of this Court so holding.

The Government instead attacks and demands a repudiation of the uniform holdings of this Court for over 75 years to the effect that neither fire insurance nor the business of fire insurance is commerce.

That complete repudiation of the many insurance cases decided by this Court is sought, is shown by the following:

The Government bluntly appeals to the "prerogative" of this Court to determine whether or not to "adhere to

prior decisions" (pp. 10 and 80)[1], and criticizes defendants' opposition to "a reversal of this Court's past doctrine" (pp. 11 and 123).

The Government admits that formerly it would have been "futile" to have brought suit under the Sherman Act against insurance companies (p. 97), but asserts that "Congress was not as a matter of legislative intention attempting to bind the Court to the tenets of its prior decisions, or to deprive it in this field alone of its frequently exercised privilege of changing its mind" (p. 79).

The Government states that the administrative inaction on its part in instituting suit was the result of "coercion of judicial pronouncements"—the barrier to the application of the Sherman Act having been "erected by the judiciary, not the legislative nor the executive"—and that therefore "only the judiciary can remove it" (p. 99).

In brief, the Government, without the support of a single relevant authority, demands that this Court now hold for the first time that fire insurance is commerce, that all of its previous decisions in this regard are wrong and thus that the indictment be sustained.

Uniform rulings on insurance.

This Court beyond question has squarely and repeatedly held that fire insurance, whether or not a business, is not commerce.

In 1868, the question of whether fire insurance is commerce was first presented to this Court in the now famous case of *Paul* v. *Virginia*, 8 Wall. (75 U. S.) 168. An insurance agent there attacked the validity of State regulation of fire insurance on two independent grounds, either of which, if upheld, would have sufficed to establish the inva-

[1] Page references appearing herein are to the Government brief where not immediately following a quotation from a case, statute, report or article.

lidity of the regulation. The second ground—characterized by the agent as "conclusive"—was that fire insurance is "intercourse" and thus "commerce" under *Gibbons* v. *Ogden*, and hence protected by the commerce clause of the Constitution from State regulation (8 Wall. 171-174).

This Court, in ruling that the State regulation in question was not invalid on either of the grounds advanced, squarely held that:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts *are not articles of commerce* • • • They *are not subjects of trade and barter* • • • They *are not commodities* to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts *are not inter-state transactions, though the parties may be domiciled in different States.* • • • *They are, then, local transactions*, and are *governed by the local law. They do not constitute a part of the commerce between the States* • • • " (p. 183).

In subsequent decisions, the Supreme Court has repeatedly reexamined and uniformly reaffirmed that not only the contract—but the very *business*—of fire insurance is not commerce.

1895—*Hooper* v. *California*, 155 U. S. 648:

> "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce" (p. 655).

1896—*Noble* v. *Mitchell*, 164 U. S. 367:

> "• • • the business of insurance is not commerce • • •" (p. 370).

1900—*New York Life Insurance Company* v. *Cravens*, 178 U. S. 389:

> "That the business of life insurance is not interstate commerce is decided * * *" (p. 401).

1913—*New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495:

> "* * * contracts of insurance are *not commerce at all, neither state nor interstate*" (p. 510).

1927—*Bothwell et al.* v. *Buckbee, Mears Company*, 275 U. S. 274:

> "A contract of insurance, although made with a corporation having its office in a State other than that in which the insured resides and in which the interest insured is located, is not interstate commerce" (pp. 276-7).

1935—*Colgate* v. *Harvey*, 296 U. S. 404:

> "The business of insurance has grown to vast proportions * * *. But insurance is not commerce * * *" (p. 432).

The following are additional decisions in which this Court has ruled, in accord with *Paul* v. *Virginia*, that insurance is not commerce:

Ducat v. *Chicago*, 77 U. S. 410;
Liverpool Insurance Company v. *Massachusetts*, 77 U. S. 566;
Philadelphia Fire Association v. *New York*, 119 U. S. 110;
Nutting v. *Massachusetts*, 183 U. S. 553;
Northwestern Mutual Life Insurance Company v. *Wisconsin*, 247 U. S. 132.

Uniform recognition of facts of insurance.

This Court has uniformly held that fire insurance is not commerce, we should note, with full knowledge of the facts of this business.

Contractual in nature: In the first place, this Court has repeatedly recognized the strictly contractual nature of fire insurance—that such insurance merely provides a contract to indemnify against loss.

To illustrate, the contract of fire insurance—unlike securities and the tickets in the *Lottery* case—has no intrinsic value which may be sold or exchanged on the market as an article of commerce. Fire insurance only protects the assured named in the contract and only so long as he retains an insurable interest in the property subject to fire risk. Accordingly this Court in *Paul* v. *Virginia*, 8 Wall. (75 U. S.) 168, expressly recognized that insurance, in providing these contracts, does not deal in commodities[1], explaining:

> "These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities" (p. 183).

Fire insurance is totally unlike the Group Health Association in the *Medical Association* case, which afforded all types of medical services, treatment, housing, equipment and other facilities. As this Court stated in *New York Life*

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[1] Incidentally the indictment herein is premised entirely upon the express definition of fire insurance as a "commodity" and thus commerce (par. 11; R. 8). The Government in its present brief apparently has abandoned this completely untenable theory.

Insurance Company v. *Deer Lodge County*, 231 U. S. 495, insurance solely involves:

> "• • • a personal contract, a mere indemnity, for a consideration, against the happening of some contingent event • • •" (p. 508).

Local in nature: In the second place, this Court has recognized the inherently local nature of fire insurance.

Fundamentally fire insurance covers risks of loss to insurable interests in fixed or immovable property and property having a specified location—and thus is intimately related to and interwoven with the property and local laws pertaining thereto in the several states.

The policy of fire insurance is effected through a local agent, as a purely intrastate transaction, and in fact does not become binding until signed by him.[1]

In *Paul* v. *Virginia*, 8 Wall (75 U. S.) 168, this Court emphasized that fire insurance transactions are:

> "• • • local transactions • • • governed by local law" (p. 183).

Again, in the very recent decision of *Hoopeston Canning Co., et al.* v. *Cullen*, 318 U. S. 313, this Court similarly stressed the local nature of fire insurance, pointing out that:

> "The intimacy of the relation of these insurance contracts to the state of New York becomes even more apparent when it is remembered that the property insured is in the state of New York" (p. 318).

In fact, the Government itself (pp. 25-26) recognizes the "local character" of fire insurance in its attempted improvement upon the reasoning in *Paul* v. *Virginia*.

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[1] Par. 18 of the indictment (R. 9). See also *Osborn et al.* v. *Ozlin, et al.*, 310 U. S. 53.

It is true that so-called inland marine insurance, as distinguished from fire insurance, is issued to cover not only property having a fixed location but property which may move from place to place. However, the total inland marine business, including both that on property with a fixed location and that on property which may move from place to place, is relatively insignificant.

This is clearly illustrated by an analysis of the *total* net premiums written on fire insurance and inland marine insurance in the States named in the indictment, for the period of ten years through 1941. In Alabama only 3.2% was collected for *all* inland marine coverage. In Florida, the percentage was only 4.7%, in Georgia, 5.2%, in North Carolina, 3.8%, in South Carolina, 2.8% and in Virginia, 4.3%. In brief, of the total net premiums written in these six southeastern States, approximately 96% was for fire insurance solely against hazards to properties having a fixed location[1]—and 4% was for inland marine in part also against hazards to properties having a fixed location.

That fire insurance customarily relates to property having a definite fixed situs is shown by the "insuring" provision of the standard forms of fire insurance policies. For example, the one adopted in December, 1916 by the National Convention of Insurance Commissioners[2] and used today in many States,[3] reads:

> "• • • against all DIRECT LOSS AND DAMAGE BY FIRE and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding ..... Dollars, to the follow-

[1] Weekly Underwriter, "Record of Fire Insurance by States for 1942" (1943), Appendix A of this Brief.

[2] Proceedings, National Convention Insurance Commissioners, 1916 adjourned meeting, p. 15.

[3] The Spectator, "Fire Insurance Laws, Taxes and Fees, 1942-1943" (1942), p. 26.

> ing described property *while located and contained as described herein*, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, *but not elsewhere*, * * *".

At most an incident to commerce: In the third place, this Court has recognized that insurance at most is an incident to commerce.

This Court has emphasized that this does not make insurance itself commerce. In *Hooper* v. *California*, 155 U. S. 648, for example, this Court flatly denied that marine insurance became commerce merely because it was an incident thereof—stating that any other ruling would ignore:

> "* * * the real distinction * * * between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other" (p. 655).

Likewise in *Thames and Mersey Marine Insurance Company Limited* v. *United States*, 237 U. S. 19, cited by the Government, this Court, while holding that marine insurance was utilized in exportation, specifically recognized that:

> "* * * as this court has said that the insurance business, generically considered, is not commerce * * *" (p. 25).

The inland marine contract, indeed, while in some cases it is an incident of commerce, is as much local as the fire insurance contract. It is a personal contract, made within the borders of a specific State and subject to the laws of that State, for the purpose of indemnifying the assured against contingent losses.

Use of the mails: Finally, this Court has recognized that fire insurance, like other non-commerce activities,

uses the mails, the telephone and the telegraph for the transmission of information, money and papers. It has also noted that fire insurance is a non-commerce activity of large size.

In *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, in particular, this Court expressly considered each of these facts and nevertheless held that insurance is not commerce. The *Lottery* case, strongly relied upon by the Government here, was held by this Court not to be applicable.

It was urged in the *Deer Lodge* case that insurance is commerce because of the mode in which the business is conducted in modern times, involving the execution of contracts between people of different States, the transmission of premiums and messages across State lines, and the use of the mails. The size and magnitude of the transactions involved was stressed.

This Court, in rejecting these arguments, ruled:

> "A policy of insurance, the cases declare, is a personal contract, a mere indemnity, for a consideration, against the happening of some contingent event, which may bring detriment to life or property, and its character is the same no matter what the event insured against * * *. Nor does the character of the contracts change by their numbers or the residence of the parties. * * * To accomplish the purpose there is necessarily a great and frequent use of the mails, and this is elaborately dwelt on * * * it being contended that this and the transmission of premiums and the amounts of the policies constitute a 'current of commerce among the States.' This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character" (pp. 508, 509).

In emphasizing that the size and magnitude of the transactions involved did not convert insurance into commerce, this Court said:

> "The number of transactions do not give the business any other character than magnitude" (p. 509).

And, in conclusion:

> "It is contended that *Paul* v. *Virginia* and the cases which follow it must be limited, as it is contended 'the facts therein did limit them, to intrastate, not interstate, contracts,' and that if they be not so limited the *Lottery Case,* 188 U. S. 321, and *International Textbook Co.* v. *Pigg,* 217 U. S. 91, cannot stand.
>
> "The basis of this contention necessarily is the insistence that the contracts in *Paul* v. *Virginia* and the succeeding cases were intrastate contracts while the contracts in the case at bar are interstate contracts. But this is a false characterization of the contracts. The decision of the cases is that contracts of insurance *are not commerce at all, neither state nor interstate"* (p. 510).

Uniform rulings in Sherman Act cases.

This Court, with the full knowledge of the facts of insurance reiterated in this case, has recognized not only that insurance is not commerce but that it is not commerce within the meaning of the Sherman Act.

This Court has not, as the Government would have it believe, confined the pronouncement of that doctrine to cases where it was feared "that otherwise the power of the states" to regulate "could not be sustained" (p. 7).

Thus, in *Blumenstock Brothers Advertising Agency* v. *Curtis Publishing Company,* 252 U. S. 436, this Court, in holding a type of local activity not to be interstate commerce within the meaning of the Sherman Act, referred to

insurance as similarly not being "commerce" within that Act:

> "* * * This [Blumenstock] case is * * * within that line of cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse" (pp. 442-443).

In *Hopkins* v. *United States*, 171 U. S. 578, this Court, in holding local activity not to be interstate commerce within the meaning of the Sherman Act, also pointed out, as illustrative of the type of business which is not "commerce":

> "* * * contracts of marine insurance are stated not to appertain to interstate commerce * * *" (p. 602).

Similarly, in *National League of Professional Baseball Clubs et al.* v. *Federal Baseball Club of Baltimore, Inc.*, 269 Fed. 681 (Ct. App., D. C. 1920) aff'd 259 U. S. 200, the court, in justifying a holding that baseball is not interstate commerce within the meaning of the Sherman Act, placed insurance in a similar status. The court explained that:

> "* * * the court [has] held that the business of marine insurance was not commerce * * *. So, here, baseball is not commerce * * *" (p. 685).

In *Lown* v. *Underwriters' Association*, C. C. H. Fed. Trade Reg. Serv., Par. 6128 (Sup. Ct., D. C. 1915), the court squarely held that fire insurance is not commerce within the meaning of the Sherman Act. The plaintiff, by a petition in the Supreme Court of the District, sought to restrain the defendants from fixing rates for fire insurance in the District of Columbia. The court denied relief to the plaintiff, holding:

> "The issuing of a policy of insurance is not a transaction of commerce within the meaning of the

clause of the Constitution which provides that Congress shall have the power to regulate commerce with foreign nations and among the several States. *Paul* v. *Va.*, 8 Wall., 168; *Hooper* v. *Cal.*, 155 U. S., 648; *New York Life Insurance Co.* v. *Cravens*, 178 U. S., 389."

The record in the case discloses that an appeal was taken but never perfected.

Again in *Werth* v. *Fire Companies' Adjustment Bureau, Inc.*, 160 Va. 845, 171 S. E. 255 (1933), *certiorari denied*, 290 U. S. 659, the court of last resort of Virginia held that the Sherman Act is not applicable to fire insurance. The plaintiff sought to recover damages from the defendant for an alleged violation of a statute of Virginia which prohibited combinations and monopolies which "would be prohibited and penalized under the provisions of any law of the United States if their activities extended to interstate as well as intrastate commerce." In affirming judgment for the defendant, the court held that fire insurance is not trade or commerce, and therefore that restraint and monopolization of such insurance were not prohibited or penalized by the Federal anti-trust laws, saying:

> "If insurance, and the activities which grow out of it, of which the adjustment of losses is one of the most vital, is not trade or commerce in the statutory sense, then it *is not 'prohibited and penalized' by the federal anti-trust laws*, and, if it is not condemned by those laws, it is not condemned by the Virginia law.
>
> • • • • • • •
>
> "Is insurance, with its attendant or incident activities, comprehended within the term 'commerce' or its synonym 'trade'? It has been repeatedly held not to be by many of the courts of the land, including the Supreme Court of the United States and this court" (171 S. E. 259-260).

Certiorari in this case was denied by this Court (290 U. S. 659).

Finally, in the instant case, the District Court squarely held that:

> "The whole case depends upon the question as to whether or not the business of insurance is interstate trade or commerce, and if so, whether the transactions alleged in the indictment constitute interstate commerce.
>
> *"The Supreme Court has repeatedly held, during a period of seventy-five years, that the business of insurance is not commerce, either intrastate or interstate. They have done so unequivocably and unambiguously.*
>
> • • • • • •
>
> "• • • the finding by the Supreme Court that the business of insurance is not commerce, seems to me to demand a finding that the business of insurance is not 'interstate trade' and is not covered by the Sherman Act" (R. 18-20).

No reversal of uniform holdings.

Defendants respectfully submit that in view of this unbroken line of precedent for 75 years, uniformly acquiesced in and acted upon as controlling law by Congress, the States and the insurance companies, fire insurance should not now belatedly be held to be commerce within the meaning of the Sherman Act.

That "fire insurance is not commerce" arose, according to the Government, "out of the Court's concern that otherwise the power of the states could not be sustained" (p. 7).

However, it now asks this Court to have no such concern—but rather to repudiate this unbroken line of precedent with the admitted effect (as we will subsequently show) of nullifying State regulation.

That this Court does not thus overrule precedent, inevitably resulting in basic changes of policy and readjustment of laws, is clearly established in *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, wherein it was said:

> "If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of state legislation, and under varying circumstances the same principle was applied in all of them. For over forty-five years[1] they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision" (p. 502).

Authorities cited by Government.

The Government, in requesting a reversal of this long line of insurance cases, argues that "commerce" has an unlimited meaning and accordingly must embrace fire insurance. "All agree", says the Government, "that 'commerce' embraces every phase of commercial and business activity, and that this includes insurance" (p. 8).

The Government asserts that merely because fire insurance involves on a large scale "the movement of money, information, and documents" across State lines—and what local activity does not today—*ipso facto* fire insurance is interstate "commerce" subject to controlling federal rather than State regulation (pp. 6-7).

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[1] It is now over 75 years.

The Government, however, is unable to cite a single decision of this Court holding that "commerce" could or does embrace fire insurance. To analyze briefly the decisions selected and cited by the Government as leading, in its summary of argument (pp. 6-11):

(a) *Paul* v. *Virginia*, 8 Wall (75 U. S.) 168 (p. 7), cited by the Government, held squarely that fire insurance is not commerce (8 Wall. 183).

(b) *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (p. 7), likewise cited by the Government, ruled that the business of preparing, printing and publishing a magazine is peculiarly local (303 U. S. 258). In the course of this Court's reasoning *Paul* v. *Virginia* and other insurance cases were cited as authoritative, thereby if anything demonstrating that this Court continued to view fire insurance as not commerce (303 U. S. 253).

(c) *Gibbons* v. *Ogden*, 9 Wheat. (22 U. S.) 1 (p. 8) held merely that navigation is commerce (9 Wheat. 189-90). This Court nowhere suggested that fire insurance is commerce. Indeed when the *Gibbons* case was subsequently cited by counsel in *Paul* v. *Virginia* (8 Wall. 172), which dealt with insurance, this Court disregarded the case as not applicable. Subsequently this Court distinguished insurance on a ship from the ship itself, in *Hooper* v. *California*, 155 U. S. 648, holding that whereas a ship engaged in navigation is engaged in commerce the insurance taken out by the shipper is not commerce.

(d) *Champion* v. *Ames*, 188 U. S. 321 (p. 8) held merely that lottery tickets are subjects of traffic among those who choose to sell or buy them and thus that their carriage from one State to another is commerce (188 U. S. 353-4). The Court nowhere ruled there that fire insurance is a subject of traffic bought and sold on the market—having already held to the contrary in *Paul* v. *Virginia*—and thus in no-

wise ruled on fire insurance as commerce. This Court squarely held subsequently in *New York Life Insurance Company* v. *Deer Lodge County* that the *Lottery* case is not applicable to insurance (231 U. S. 510-11).

(e) *American Medical Association* v. *United States*, 317 U. S. 519 (pp. 8-9) held solely that an organization supplying doctors, beds, nurses, medicine, medical equipment and other facilities is engaged in commerce within the meaning of Section 3 of the Sherman Act (317 U. S. 526, 528). The Court nowhere discussed either (1) fire insurance, which is completely distinguishable from a medical association in that fire insurance merely provides indemnity against loss, or (2) the meaning of "commerce" in Sections 1 and 2 of the Sherman Act. A company may be engaged in "commerce" under Section 3 of the Act without being engaged in "commerce" under Sections 1 and 2. *Atlantic Cleaners & Dyers Inc.* v. *United States*, 286 U. S. 427, 433-435 (1932)[1] and the opinion of the court below (R. 19).

(f) *Thames and Mersey Marine Insurance Company* v. *United States*, 237 U. S. 19 (pp. 8-9) unequivocally recognized that marine insurance, while used by the export trade, is generically not commerce (237 U. S. 25-26).

(g) *German Alliance Insurance Company* v. *Kansas*, 233 U. S. 389 (p. 9) upheld State regulation of fire insurance. The Court impliedly recognized that fire insurance is not commerce, because it ruled that insurance is "for indemnity against loss and is personal" (p. 411)—a far cry from commerce.

(h) *Kidd* v. *Pearson*, 128 U. S. 1 (p. 9), held that manufacturing is not commerce (p. 20). This Court has subsequently held that manufacturing is subject to the commerce power of Congress, on the ground that it affects commerce, but this Court has not held that manufacturing is *per se* commerce. This case, if authority for anything, would be authority against holding fire insurance to be commerce.

(i) *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 and *Northern Securities Company* v. *United States*, 193 U. S. 197 (p. 10), held that the Sherman Act is to be applied literally, without exception, to each and every restraint of trade and commerce—a holding subsequently overruled in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 64 *et seq.* These cases do not hold that the Act applies to any activity which is not commerce—such as fire insurance—but merely that it applies to activities which are clearly interstate commerce, namely, interstate railroads.

[1] Here again the Government (pp. 39-40, footnote 54), in accordance with the fundamental theory of its entire brief, requests this Court to disregard its ruling in the *Atlantic Cleaners & Dyers Inc.* case on the ground that it "cannot be supported".

II.

Congress Has Accepted and Approved the Supreme Court Decisions That Fire Insurance Is Not Commerce.

Government argument.

The Government, in support of its contention that fire insurance is "commerce" within the meaning of the Sherman Act, refers to allegedly favorable Congressional history.

The Government states that "The Court's treatment of the Sherman Act as going to the limits of the commerce power is fully supported by the Act's legislative history" (p. 73), and that "Congress intended the Sherman Act to exercise all of its commerce power under the subject regulated" (p. 76), thus leaving "the Courts with freedom to exercise their usual prerogative in determining whether or not to adhere to prior decisions" (p. 80).

The Government seeks to imply from this that Congress intended the Sherman Act to apply to fire insurance.

Congressional views on Sherman Act.

Even a superficial analysis of Congressional history reveals the fact that Congress has consistently acted on the assumption that fire insurance is not commerce—whether under the Sherman Act or otherwise.

Thus when the Senate was debating the enactment of the Sherman Act, Senator Turpie of Indiana specifically called attention to the fact that the word "commerce" did not include insurance in view of the ruling on that subject by the Supreme Court.

Said the Senator:

> "The Senator from Missouri (Mr. Vest) spoke the other day about the difficulty of defining the word 'commerce', especially as contained in the phrase 'interstate commerce'. I recollect one judicial decision upon this subject very definitely. The Supreme Court has decided that insurance is not commerce * * *" (21 Cong. Rec. 2556).

Congress thereupon passed the Sherman Act in 1890 without attempting, by definition or otherwise, to include insurance.

Subsequently, after this Court in the *Deer Lodge County* and similar cases had reaffirmed that insurance is not commerce, Congress exhaustively reviewed its anti-trust legislation.

During the debates on this revision, eventually known as the Clayton Act, Representative Webb expressly pointed out that:

> "* * * insurance companies are not reached, as the Supreme Court has held that their contracts or policies are not interstate commerce" (51 Cong. Rec. 9390).

Congress then passed the Clayton Act in 1914 without making the slightest attempt to apply it to insurance.

Again in 1937 Congress once more amended the anti-trust laws, specifically Section 1 of the Sherman Act,[1] without disturbing the settled view that the anti-trust laws did not apply to insurance.

This legislative record can only be construed as an understanding or acquiescence by Congress in the view that fire insurance is not—and was not intended to be—"commerce" within the coverage of the anti-trust laws.

Cf. *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, 336.

Congressional views opposing any federal legislation.

Congress indeed has refused repeatedly to approve any federal legislation applying to fire insurance.

Rather Congress has concurred fully with this Court's rulings that insurance, not being commerce, properly should be left with the States, free of federal interference.

In 1866 a bill was introduced in the House[2] providing for the creation of a national bureau of insurance as a subordinate part of the Treasury Department. This bill was not passed.

In 1892, a bill was introduced in the House[3] to create the office of Commissioner of Insurance. That bill was never reported out of Committee.

In 1897, a bill was introduced in the Senate[4] to declare that insurance companies operating outside of the States of their incorporation were to be deemed engaged in interstate commerce. That bill was never reported out of Committee.

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[1] Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693.

[2] H. R. 738, 39th Cong., 1st Sess., June 29, 1866.

[3] H. R. 9629, 52nd Cong., 1st Sess.

[4] Senate Bill 2736, 55th Cong., 2nd Sess.

In December, 1904, President Theodore Roosevelt, in his message to Congress, suggested that careful consideration be given to whether the constitutional powers of Congress with respect to commerce extended to transactions in insurance.

Shortly thereafter, a bill was introduced in the Senate[1] by Senator Dryden to establish a Bureau of Insurance in the then recently created Department of Commerce and Labor. The bill died in Committee.

Again in 1905, President Theodore Roosevelt, in his message to Congress, discussed the question of regulating interstate insurance transactions. Consideration of this portion of his message was referred to the Committees on the Judiciary of the House and the Senate.

The report of the House Judiciary Committee, in recommending no action, stated[2]:

> "The question as to the power of Congress to regulate and control insurance corporations created by the States has been squarely and fully presented to the Supreme Court of the United States, and the court has many times held that insurance is not commerce, and that Congress has no power to regulate insurance corporations or their business. *The views of the Supreme Court have practically met the approval of the bar and business men of the United States as being in accordance with law and common sense* (p. 14).
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> "If there was any doubt upon the subject, it has been dispelled by the argument made for Federal control. All at once it is voiced throughout the nation that a way out of the difficulty has been discovered, and the happy thought is suggested that Congress can declare insurance to be commerce;

[1] Senate Bill 7277, 58th Cong., 3rd Sess.

[2] H. R. Rep. No. 2491, 59th Cong., 1st Sess., March 23, 1906.

and that on account of the great interests involved the Supreme Court will reverse itself and the law of the nation and hold the legislation constitutional. *The suggestion is not very complimentary to the Supreme Court that, on account of great interests involved, that tribunal would reverse its decisions for a century, absolutely wipe out and destroy the police powers of the States that have so many times been upheld by that court*" (p. 18).

The Senate Committee on the Judiciary made a similar recommendation[1].

In 1914 and 1915, resolutions were introduced in both the House and the Senate proposing an amendment to the Constitution to the effect that "the Congress shall have the power to regulate the business or commerce of insurance throughout the United States and its territories or possessions." The resolutions were submitted to the Committees on the Judiciary of both the House and the Senate.[2] No report was made on the resolutions by either Committee.

In 1933, Senator Robinson of Indiana introduced a resolution[3] calling for an amendment to the Constitution giving Congress the power to "regulate the business or commerce of insurance throughout the United States and all territories subject to the jurisdiction thereof." That resolution died in Committee.

As a sidelight upon consideration in Congress of statutes relating to insurance, it is to be noted that the 1940 platforms of both the Democratic and Republican parties

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[1] Sen. Rep. No. 4406, 59th Cong., 1st Sess., 1906.

[2] S. J. Res. 103, 63rd Cong., 2nd Sess.; H. J. Res. 194, 63rd Cong., 2nd Sess.; S. J. Res. 58, 64th Cong., 1st Sess.

[3] S. J. Res. 51, 73rd Cong., 1st Sess.

contained planks upholding State—as distinguished from Federal—regulation of insurance.[1]

Since Congress has considered but refrained from enacting legislation specifically directed toward the insurance business, acquiescing willingly in the rulings of this Court that fire insurance is not commerce, we respectfully submit that it would amount to judicial legislation to hold that the Sherman Act encompasses that which Congress has refused to regulate by specific laws.

As emphasized in *Kirschbaum Co. v. Walling*, 316 U. S. 517:

> "* * * The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the Federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment *to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation*" (p. 522).

Department of Justice views.

It is well to note that not only Congress, but the Department of Justice, believed until this suit that fire insurance is not commerce within the meaning of the Sherman Act.

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[1] The Democratic platform contained the provision:

> "We favor strict supervision of all forms of the insurance business by the several States for the protection of policyholders and the public."

The Republican platform contained the provision:

> "We condemn the New Deal attempts to destroy the confidence of our people in private insurance institutions. We favor a continuance of regulation of insurance by the several States."

The Government concedes that the Department considered the law to be so clear on the subject that its "failure to apply the Act to insurance" was "under the compulsion of decisions" (p. 98). Even today, the Department's opinion of the existing law is that a "barrier to application of the Sherman Act to the insurance business has been erected by the judiciary" which "only the judiciary can remove" (p. 99).

The instant indictment represents the *first* effort by the Government to apply the Sherman Act to insurance since that Act became law in 1890. This failure for over fifty years to attempt to apply the Act to the business of insurance clearly points to the conclusion that Congress, the Department and the courts uniformly viewed the Act as not so applying, and emphasizes the injustice of now suddenly so applying it.

The significance of this absence of administrative action is well illustrated in *United States* v. *Cooper Corporation et al.*, 312 U. S. 600. This Court there held that Section 7 of the Sherman Act did not confer upon the United States a civil right of action for treble damages. In the course of the opinion, Mr. Justice Roberts pointed out:

> "It is significant that, in the light of the expressions by the courts, the supplemental legislation, and the legislative history, no action has ever been brought by the United States under §7 in the fifty years during which the statute has been in force until the present action was instituted. • • • In the meantime the World War intervened with the Government a purchaser of enormous quantities of material and supplies. Then, as now, the complaint was prevalent that agreements and conspiracies existed to fix and maintain prices of materials needed by the Government. And throughout the life of the legislation able

and vigilant officials devoted to enforcement of the policy of the Sherman Act have not been wanting.

"In these circumstances the conviction that no right to sue had been given the Government, rather than a supine neglect to resort to an available remedy, seems to us the true explanation of the fact that no such actions have been instituted by the United States" (pp. 613-614).

Similarly, in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349, this Court, in holding that Section 5 of the Federal Trade Commission Act did not give the Commission power to prohibit unfair methods of competition in wholly intrastate transactions, stressed that the failure of the federal enforcement agencies to proceed against local activities indicated that they had no power to do so:

"That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, *so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred*" (pp. 351-352).

If the Department had believed that fire insurance is commerce within the scope of the Sherman Act, undoubtedly appropriate action would have been taken. As this Court itself pointed out in the *Cooper* case, above quoted:

"* * * throughout the life of the legislation able and vigilant officials devoted to the enforcement of

the policy of the Sherman Act have not been wanting" (p. 614).

Theory of unlimited delegation.

There certainly is no justification whatever, in view of this history of the enactment and enforcement of the antitrust laws, for the contention advanced by the Government that Congress had no particular views on fire insurance and accordingly enacted a mere Sherman "principle" which the courts were or were not to apply to fire insurance in their uncontrolled discretion.

The Government sweepingly asserts with respect to the application of the Sherman Act that:

> "* * * the proposed legislation was a mere statement of principle from which the courts would determine the scope of the Act.
>
> "* * * Congress was not as a matter of legislative intention attempting to bind the Court to the tenets of its prior decisions, or to deprive it in this field alone of its frequently exercised privilege of changing its mind" (pp. 77-9).

We submit that Congress had neither the intention nor indeed the power, in abdication of its legislative functions, to enact a mere "Sherman Principle" and to authorize the courts to apply that "Principle" to fire insurance if and when they saw fit. Every manifestation of Congressional intent leads uniformly to the conclusion that Congress employed the word "commerce" in the Sherman Act in the sense then known and accepted—namely to the exclusion of fire insurance. Surely in view of this Congressional intent the word "commerce" in the Sherman Act cannot now be expanded beyond this Congressional meaning to conform to the Department of Justice's current views.

Authorities cited by the Government.

The miscellaneous Congressional history cited by the Government is so irrelevant as scarcely to merit attention. If anything, it demonstrates Congressional intent not to regulate insurance as commerce.

(a) *General statements by members of Congress* (pp. 73-78). The Government refers to general statements by members of Congress that the Sherman Act was intended to exercise all of Congress' power over the subject. However, as noted above, Congress at the time of enactment was apprised of the fact that this Court had held insurance not to be "commerce" within its power, and had willingly acquiesced in the view that the Sherman Act was not to apply to insurance. Its responsible committees thereafter repeatedly concurred in the Supreme Court decisions on the subject.

(b) *Commerce and Labor Act* (p. 86): The Government refers to this Act, now repealed, which when presented to Congress provided for (1) a federal Bureau of Insurance and (2) the collection of data on corporations engaged in interstate commerce.[1] Congress, however, voted down the proposed federal Bureau of Insurance, merely adding to the provision for collection of data, a rider providing that insurance data should also be collected.[2]

(c) *Merchant Marine Act* (pp. 89-92): This Act, likewise referred to by the Government, expressly

[1] 36 Cong. Rec., Part I, p. 919.

[2] The only discussion with reference to the rider covering insurance data was as follows (36 Cong. Rec., Part 2, p. 2008):

"Mr. Bartlett: I desire to ask the gentleman if this report—and I have read it very carefully—in reference to insurance companies does anything more than to authorize the Commissioner to gather statistics in reference to insurance companies?

"Mr. Hepburn: Nothing in the world, so far as I understand."

exempted one phase of marine insurance from the anti-trust laws. Congress believed that specific anti-trust exemption of any phase of insurance was unnecessary, as insurance is not commerce, but when presented with the question on this one occasion promptly inserted the exemption on the theory that it could do no harm. To refer to the Committee recommendation[1] with respect to this exemption:

"* * * even if unnecessary, [it] can do no harm * * *".

III.

The States Have Curtailed Competition In Fire Insurance In Reliance Upon The Supreme Court Decisions That Fire Insurance Is Not Commerce.

Government argument.

The Government frankly concedes the obvious, namely that if fire insurance is held to be "commerce" within the meaning of the Sherman Act, inconsistent State regulation must fall.

The Government specifically discusses twenty-one States, listing: (a) five whose laws, according to the Government, clearly would be nullified if the Sherman Act be applied to fire insurance, (b) eleven more whose laws thus might be nullified and (c) five others whose laws "might" be sustained (p. 130).

The Government accepts as unquestioned that "State laws could not, of course, stand to the extent that they are inconsistent with a valid Federal statute" (p. 126). It

[1] Report on Status of Marine Insurance in the United States by S. S. Huebner; Including Recommendations of Sub-Committee on Merchant Marine and Fisheries (1920, Washington, GPO) 78.

bluntly brushes aside this destruction to State regulation, however, as not even a "relevant consideration" (p. 126). It argues that all State regulation of fire insurance would not be nullified, under this principle, but insists that even if it were so nullified "it is for Congress and not the states" to govern here—condemning any subordination of the Sherman Act "to the policies of the states" (p. 123).

State regulation of fire insurance.

There can be no question but that present day State regulation of fire insurance would be nullified by application of the Sherman Act to such insurance.

In reliance upon the decisions of this Court holding fire insurance not to be commerce, the States have developed detailed systems for regulating that business.

Their experience over the years has established that unrestricted competition in fire insurance is opposed to the public interest, since it results in financial chaos, public injury and, in some instances, in a greater centralization of power. Accordingly upon the basis of this experience, present day State regulation follows a comprehensive pattern curtailing competition and encouraging uniformity of rates in direct contrast to the unrestricted competitive demands of the Sherman Act. State regulation and the Sherman Act are diametrically opposed to each other—and cannot exist side by side.

This State curtailment of competition was accurately recognized and approved by Mr. Justice Frankfurter in *Osborn et al.* v. *Ozlin et al.*, 310 U. S. 53 as follows:

> "Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissi-

tudes of life *have long been withdrawn from the benefits and caprices of free competition*" (p. 65).

Inception of State regulation.

State regulation had its inception over ninety years ago when New Hampshire in 1851,[1] Massachusetts in 1852[2] and Rhode Island in 1855[3] each established a Board of Insurance Commissioners.

By 1890, when the Sherman Act became law, eighteen States had established independent insurance departments.[4] However, State regulation, as known today, had then just begun to develop.

State anti-compact laws.

At first, a number of States felt that the public would be served best by unrestricted competition in the formulation of premium rates.

In twenty-two States, this trend of thought crystallized in the enactment of anti-compact laws prohibiting combinations between insurers for the joint fixing of rates.[5]

But by 1911, many States began to realize that unlimited competition not only failed to benefit the public,

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[1] N. H. L. 1851, Chap. 1111.

[2] Mass. L. 1852, Chap. 231.

[3] R. I. L. 1854, Sec. 17.

[4] Patterson, "The Insurance Commissioner in the United States" (1927), p. 536, note 62.

[5] Alabama, Arkansas, Georgia (modif. form), Iowa, Kansas Louisiana, Maine, Michigan, Mississippi, Missouri, Nebraska, New Hampshire (only as to foreign insurance companies), Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wisconsin (*Cyclopedia of Insurance in the United States*, 1910-1911, pp. 31-46). Arizona, Ariz. Code Ann. (1939) Vol. 5, Secs. 74-101.

but actually injured it. This is brought out by the Legislative Committee reports and other authorities hereinafter discussed.[1] The injurious consequences of unrestricted competition assumed real significance. Competition instead of being the "life of the business" more closely approximated its death knell.[2]

Five of the States having anti-compact laws formally repealed them.[3] Of the remaining seventeen States, eleven[4] have restricted their anti-compact laws by requiring or permitting fire insurance companies to become members of rating bureaus which through joint action establish for

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[1] For example, the 1911 Report of the Joint Committee appointed by the Senate and Assembly of the State of New York, hereinafter referred to as the Merritt Committee Report, stated:

> "The actual working of anti-compact laws has not been satisfactory; they have not decreased rates and they have greatly increased discrimination; they have taken the rate-making out of the hands of the companies, who were in direct contact with the business and put it in the hands of persons who had no way of testing by experience the rates which they made, and who furthermore did not stand in such relation to policy-holders as to feel the force of public opinion.
>
> "It is well recognized that in general anti-compact laws have been a failure and there is noticeable a distinct reaction against them" (p. 44).

[2] Huebner, *Property Insurance*, pp. 347-348 (3rd Ed., 1938); 2 Gephart, *Principles of Insurance* (1917), p. 319.

[3] Alabama, No. 359, Acts of Alabama 1923; Maine, Chap. 26, Laws of 1895; Mississippi, Chap. 182, Laws of 1926; Tennessee, Chap. 33, Act of General Assembly 1919; Virginia, Chap. 602, Act of Assembly 1902.

[4] Arkansas, Pope's Dig. of Ark. Stat. (1937), Vol. 2, Sec. 7722; Kansas, Gen. Stat. of Kan. (1935), Sec. 40-922; Louisiana, Dart's La. Stat. Ann. (1939); Vol. 3, Sec. 4222(1); Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.52; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5972; Ohio, Page's O. Gen. Code, Vol. 6, Sec. 9592-1; Oregon, Ore. Comp. Laws of 1940, Vol. 7, Sec. 101-1605; South Carolina, S. C. Code (1942), Vol. 4, Sec. 8008; South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.3701; Washington, Remington's Rev. Stat. of Wash. (1932, 1940 Supp.), Vol. 8, Sec. 7119; Wisconsin, Wis. Stats. (1939), Sec. 203.33.

members uniform fire insurance rates for like hazards, in like localities, with like exposures and occupancies.

This reversal by the States of their former efforts to compel unlimited competition demonstrates their experience that uniformity rather than competition in fire insurance best serves the public interest. Today, anti-compact or anti-trust laws in so far as fire insurance is concerned are generally considered a thing of the past.

This view is aptly expressed in Patterson, *The Insurance Commissioner in the United States* (1927), wherein the author, referring to anti-compact laws, succinctly states:

> "These statutes represent the obsolescent theory that rates should be kept low by compelling competition and repressing all movements to eliminate competition" (p. 155).

Wandel, in *The Control of Competition in Fire Insurance* (1935), generally summarized this State experience with competition in fire insurance as follows:

> "Throughout the years of legislation antagonistic to the control associations, it gradually became evident that such inimical laws were seldom if ever effective, that abuses existed under them, that competition through rate-cutting and the payment of excessive commissions was not in fact desirable and that, on the contrary, it was desirable for companies to combine their experience for purposes of rate-making" (p. 133).

State experience now hostile to competition.

Today, the overwhelming majority of States, after years of experience, curtail competition in fire insurance, in direct contrast to the unlimited competitive demands of the Sherman Act. Their experience in regulation, gained through

the painful process of trial and error, has caused the States to be justly proud of their insurance statesmanship—and they resent and strenuously object to any belated federal interference.

Their experience has taught the States that unlimited competition in fire insurance—as distinguished from other businesses—leads to: (1) insolvency of insurers which in turn injures the assured public since they will not only have paid out their money for nothing but, worse, will have relied in ignorance on a worthless indemnification; (2) competition going to greater extremes than in other businesses; (3) increased fire losses due to failure to take proper precautions to minimize hazards; (4) discrimination in favor of the influential assured whose business is sought rather than the average assured; and (5) a greater concentration of wealth and power in the larger, at the expense of the smaller, companies.

The light-hearted theoretical reasoning of the Government here cannot stand against these considered judgments—reached by many independent investigations by State authorities—after years of bitter experience.

Illustrative of this State experience are the following:

New York, speaking through the 1911 Report of the Merritt Committee,[1] discussed each of the results above listed (Nos. 1-5) in detail:

(1) *Insolvency of insurers:*

"We have now to consider the effect of open competition in fire insurance. It is not necessary to

[1] The Report of the Insurance Commission for the Province of Ontario, Canada (1919) makes the following statement with reference to the Merritt Committee report:

"It is generally conceded that the work of this committee constituted the most thorough and complete enquiry ever undertaken, and that their report is the most valuable compendium of results and conclusions ever put together on the subject referred to them."

theorize about this for there is plenty of evidence in the rate wars which were formerly carried on and which to some degree still prevail. The universal effect of such periods of open competition wherever and whenever they have occurred has been a cutting of rates to a point that was below the actual cost of the indemnity. If the rate war had been general this would have meant the ultimate death of the company, and rate wars of even a local character lead, if long continued, to the dissolution of the smaller and weaker companies. The effect on all companies is weakening. The policy-holder, to be sure, gets his insurance very cheaply; too cheaply, for the weakening of the companies is not in the long run and on the whole an economic good. * * * It has not done the policy-holder any good to get cheap insurance if, when the test comes, the protection is found to be worthless" (p. 41).

(2) *Competition going to extremes:*

"The question occurs to one whether there cannot be open competition that does not go to an extreme, such competition as there is in, for instance, the grocery business or the shoe business. The distinction seems to be this: the grocer has very clearly in mind what his goods have cost him and what price he must get for them if he is to escape a loss, and he will not, except in an extremity, sell at a loss. The underwriter, on the other hand, is selling indemnity against something that may never occur, so, however low his price, there is always some possibility that he will escape without a loss; at any rate he can gamble on the chance. What corresponds to the point below which the grocer dare not go without a loss is the average loss experience on the class to which the risk belongs. But this is not easily ascertained; at any rate it does not stare the underwriter in the face in the same way that the buying price of sugar confronts the grocer" (p. 42).

(3) *Increased fire losses:*

"The beneficial effects of schedule rating have been demonstrated by the rise in the burning ratio which follows a period of demoralization in rates. During a rate war schedule rating is of course abandoned. It then follows that untidy conditions or the absence of a watchman will not be penalized through the rate, and so rubbish is allowed to accumulate, the watchman is taken off, and there is a general lowering of tone which manifests itself in an increased burning ratio" (p. 50).

(4) and (5) *Discrimination and concentration:*

"It has been demonstrated by the experience of all times and all places that open competition in fire insurance is an unstable condition which leads to the general weakening of the companies, and eventually to the elimination of small companies, further that under open competition there is always discrimination in favor of the policy-holder with influence" (p. 76).

New York, speaking again in 1942 through its Superintendent of Insurance:

"If we were to have unrestricted competition today, the result would undoubtedly be that a few large companies which could afford to cut rates would get the business and many of the smaller companies would be forced out."[1]

Illinois, in the 1911 Report of its Fire Insurance Commission to the Legislature, found:

"That this competition has inured to the benefit of corporations, trusts, and large property values generally, at the expense of small property owners, has been demonstrated in many States where anti-

[1] Pink, *The Problem of Fire Rates* (1942), p. 2.

compact laws have longest sought to enforce open competition and by the fact that recently three States, Kansas, Texas and Louisiana, where these laws have been longest in force, have reversed their legislative theories and enacted laws compelling the fire companies to file their schedules, under heavy penalties for discrimination. A comparative examination of the laws and rates of the several States fails to show any benefits that have accrued to the public in the States that have enacted anti-compact laws * * *" (p. 21).

Kentucky, speaking through the 1916 report of its Fire Insurance Commission to the Governor and General Assembly:

"The Commission is satisfied that the progress of rate regulation heretofore outlined plainly points to the desirability of requiring the companies to make and assume the responsibility for the rates in the first instance giving to the State officers the fullest supervision, requiring co-operation in rate-making for efficiency and economy, equal treatment to all co-operating companies, the avoidance of discrimination between persons and properties insured, and finally the substitution of a just rate for an unjust rate where the facts are established by evidence" (p. 20).

Maine, speaking through the letter of its Insurance Commissioner to Senator Van Nuys, dated October 4, 1943,[1] stated:

"For years State regulation of insurance has been the accepted practice. State regulation aims at controlling competition and preventing unfair discrimination. State regulation puts the emphasis on

[1] Joint Hearing before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362 and H. R. 3269, 3270, p. 240.

solvency of companies as the best protection to policyholders. Federal antitrust laws would permit unrestricted competition which could lead to failure of many insurance companies, penalizing thousands of policyholders."

Michigan, speaking in 1943 through David A. Forbes, its Insurance Commissioner,[1] explained:

"In 1917 our legislature enacted our 'Fire Rating Bureau' laws, which resulted in the orderly conduct of the fire insurance business in this state. Previously, there had been discrimination in rates, the large buyer of insurance usually being able to buy his insurance cheaper than the small buyer. Free and open cutthroat competition also often resulted in the insolvency of fire insurance companies.

"Since 1917 these two evils have disappeared. The public is protected by the Commissioner of Insurance as to rates because he is given power through the fire rating division within his department to check and investigate rates charged in this State, and if he determines that such rates are excessive he has the power to suspend those rates and to substitute other rates. Within the past two years the Commissioner of Insurance of this state ordered a 7% reduction in dwelling rates.

"Furthermore, rates today in Michigan are materially lower than they were in 1917.

"If the Department of Justice's apparent views on the subject of fire insurance rates were to be upheld, then our Fire Rating Bureau laws would be in violation of the Federal laws. It would mean the return of the evils existing in this business in this state prior to 1917 to the detriment of the citizens of Michigan."

North Carolina, speaking through the May, 1926 Address of Insurance Commissioner Wade delivered at the

[1] The Eastern Underwriter, December 3, 1943, p. 8.

annual meeting of the Chamber of Commerce of the United States stated:

> "It is in the interest of the policyholder that the companies be allowed to cooperate in the making of rates" (p. 7).

Referring to anti-compact laws, the speaker proceeded:

> "Laws of this type are detrimental to the progress of insurance and certainly should be looked upon as obstructions to progressive service" (p. 7).

North Dakota, speaking through the letter of its Governor to Senator Van Nuys, dated October 12, 1943,[1] declared:

> "There has been built up in North Dakota, a considerably large body of insurance laws, regulating the business of insurance in this State. A number of fire-insurance companies have joined in establishing a joint bureau of inspection of fire risks, recommending and establishing uniform rates, based upon such investigations. This has worked very satisfactorily in North Dakota, and has resulted in uniformity and stability in the insurance business.
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> . . . . . .
>
> "I can see no reason why insurance companies should be prohibited from joining together, in making investigations of fire risks through one established agency, and in basing insurance rates upon the findings of such agency. To my way of thinking that is good business, and further, it serves to protect the public fully.'"

Pennsylvania, speaking through the 1913 Report of its Joint Legislative Commission:

> "While it is undoubtedly true that no system of ascertaining rates or prices to be charged for fire

[1] Joint Hearing before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362 and H. R. 3269, 3270, pp. 75-76.

> insurance has given unqualified satisfaction to all parties concerned, and probably no such system ever will give entire and unqualified satisfaction to everyone, yet the system hereinbefore described seems to be more scientific, exact, impartial and just,—both to insurer and insured,—than any other that has yet been devised. It gives to the insured an exact knowledge of the conditions of his property upon which the charges are based, together with an opportunity of bettering his rate by improving the character and condition of his risk." (p. 31).
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> "In conclusion, your Commission finds from the testimony adduced before it from all sources, both from the insurer and the insured, as well as that of recognized experts in the fire insurance business, that such combinations of insurance companies, or their representatives or agents, are in accordance with a wise public policy, are necessary to the solvency of the insurance companies and are beneficial to the public" (p. 53).

Florida, speaking through its Supreme Court in *Brock* v. *Hardie*, 114 Fla. 670, 154 So. 690 (1934), held that the business of fire insurance and the operation of a State rating bureau did not come within the prohibitions of the Florida Anti-Trust Act.

Missouri expressed the following view in the report of its Fire Insurance Commission appointed in 1913:

> "It is in the interest of the public, the companies and policy holders that the rate be apportioned to the hazard and all property properly classified and all risks of substantially the same hazard be given the same rate" (p. 49).

Virginia, through the 1929 opinion of its State Corporation Commission, said:

"It is a well known fact that business conditions suggest the advisability of the application of common rates by all insurance companies upon the same classes of risks within any given territory. Recognizing this fact, the act here in question (Ch. 433, Acts 1928) requires all fire insurance companies subject to the act to file their rates through the "Virginia Insurance Rating Bureau", and clearly contemplates that the same schedule of rates will be filed by the Virginia Insurance Rating Bureau for application in Virginia by all fire insurance companies required to file their rates through the bureau; and that these common rates shall be based upon the composite or aggregate Virginia experience of all fire insurance companies subject to the act, and not upon the individual experience of some one company." (p. 35)

Wisconsin, speaking through the 1913 report of its Fire Insurance Investigating Committee, stated:

"Competition does not, as is sometimes argued, make for cheaper fire insurance. On the contrary, competition increases the expense of business and in the long run the insured pays the cost. Fairness in determining the rate, and economy and efficiency in its application, require the coöperation of all rate-making machinery. There are two ways in which this may be done: (1) state rating, and (2) coöperative rating by the companies.

* * * * * *

"Enforced competition has proved a total failure so far as it affects the great mass of the insured" (pp. 46-47).

Texas, speaking through Insurance Commissioner Love, declared:

> "In my opinion, competition in fire insurance rates is illogical, opposed to sound public policy and undesirable from every standpoint" (p. 11)[1].

Similarly, the Province of Ontario, Canada, in a Report on the Insurance Commission by the Honorable Mr. Justice Masten, presented on January 18, 1919, found:

> "It is a matter of experience that unrestricted competition between insurance companies has inevitably led to rate-cutting, and eventually to the failure or absorption of the weaker companies in the field. On the surface open competition may for a time appear to be in the public interest by reducing the insurance cost, but even this is a doubtful benefit, owing to the discrimination in favour of large and influential insurers, which may, and undoubtedly does, prevail under such conditions" (p. 12).

This general condemnation of unlimited competition, based on experience and study, is also expressed in the 1915 Report adopted by the National Convention of Insurance Commissioners as follows:[2]

> "The requirements of safety and economy both make inapplicable to insurance the anti-monopoly, anti-trust and anti-compact laws looking toward unrestricted and open competition" (p. 20).

Similarly, in 1923, the National Convention of Insurance Commissioners adopted a resolution,[3] which stated:

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[1] Dean, The Philosophy of Fire Insurance (1925), Vol. III, p. 11.

[2] Proceedings, National Convention Insurance Commissioners 1914 adjourned meeting, pp. 16-25.

[3] Proceedings, National Convention Insurance Commissioners 1923 meeting, p. 165.

"WHEREAS, the public is directly benefitted by the reduced cost to the companies of rate making by co-ordinated effort; and,

"WHEREAS, such co-ordination tends to make fire insurance rates equitable as among assureds and to eliminate discrimination between policyholders; therefore, be it

"RESOLVED, That all the several States be urged to repeal laws or regulations now prohibiting such co-ordination in rate making and to substitute therefor statutory consent to fire insurance companies to join together in the economical application of a non-discriminatory standard of rate making."

To summarize the case in the words of the Merritt Committee Report:

"* * * the effect of a period of sustained open competition is the procuring by the public temporarily of cheaper insurance; this advantage mostly falls to persons of influence; the quality of the protection is lowered since the companies are weakened. Furthermore, if the process continues long enough some of the smaller companies will be forced to retire and their business will be absorbed by the large companies" (pp. 41-42).

That informed opinion has approved the departure by the States from the competitive theory of the anti-trust laws, as the result of years of experience and study, is shown by the quotations from leading text writers on insurance set forth in Appendix B of this brief.

State curtailment of competition.

The States through their Legislatures have adopted these conclusions that co-operation, not competition, in fire insurance best serves the public interest and, as the

result, have developed comprehensive systems of fire insurance regulation.

The primary objective sought thereby is to require each assured to pay a premium measured by the *hazards of his risk* rather than a premium reflecting *competitive pressures* inherent in bargaining.

Generally speaking, State regulation[1] includes provisions for insurance departments (now existent in all States); laws and regulations relating to joint determination of reasonable and equitable rates; the adequacy of rates; commissions to agents and other acquisition costs; rebating; unfair discrimination; the filing of rates, plans, rules and regulations and other information and data for public inspection; the creation and maintenance of, or provision for, organizations or bureaus for promulgating uniform rates and the supervision of the issuance of policies in conformity with applicable rules and regulations; the qualifications necessary for the admission of fire insurance companies to do business; the qualifications of agents of fire insurance companies; the special taxation of fire insurance companies, domestic and foreign; the filing of special reports by fire insurance companies; standardized types of policies and forms of fire insurance coverage; dividends of participating insurers; and control of reserves and investments.

Licensing powers: Every State, without exception, requires a license as a prerequisite to engaging in the fire insurance business. Every State has requirements aimed at maintaining the solvency of fire insurance companies licensed by it. Every State reserves the right to revoke or refuse to renew any license granted by it.

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[1] See generally, The Spectator, "Fire Insurance Laws, Taxes and Fees, 1942-1943" (1942).

This power of granting or withholding annual licenses is the keystone of the Superintendent's power over foreign insurance companies. As Patterson[1] says:

> "With respect to administrative devices, the insurance commissioner has an armory of weapons which can scarcely be equalled. • • • His licensing power is his chief weapon" (pp. 7-8).

The breadth of this licensing power is well illustrated in *Aetna Casualty & Surety Co. et al.* v. *Sullivan*, 83 N. H. 426, 143 Atl. 687 (1928), holding that the statutory power to revoke was not limited to financial responsibility, but required the Commissioner to refuse to grant a license if "for other reasons he is satisfied it does not appear that the applicant is reliable and entitled to confidence" (83 N. H. 427-8).

Rating bureaus: The primary goal of State regulation has been uniformity of premium rates for fire insurance in order to spread scientifically the cost of insurance[2] in accordance with hazards and the law of averages.

Today the generally accepted medium of reaching that goal is the rating bureau. A rating bureau is an organization usually set up and maintained by fire insurance companies to establish for their members uniform fire insurance rates. It has a staff of trained experts to study hazards of risks and loss experiences of its members, establish schedules for classes of risks, and apply those

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[1] Patterson, *The Insurance Commissioner in the United States* (1927).

[2] The cost of insurance thus allocated by rating bureaus on a scientific basis has not—as implied by the misleading figures cited in the Government brief—resulted in unreasonable profits to the companies. (See *infra*, pp. 59-60.)

schedules to individual risks to arrive at a rate for each individual risk.[1]

The object of the rating bureau is well stated in *National Union Fire Ins. Co.* v. *Dickinson*, 128 Ark. 367, 194 S. W. 254 (1917):

> "It was shown that these Bureaus are created in most of the states of the Union, the purpose of such organizations being to place the business of fire insurance *on a scientific basis so that the premiums might be fixed according to the actual risks undertaken*, and by thus making rates commensurate with the true hazards the design was that the public should get the benefit of reduced rates growing out of a scientific and systematic conduct of the business" (194 S. W. 258).

In States which specifically provide by statute that insurance companies may or must be members of rating bureaus, the usual requirement is that the bureau rates must be filed with the State Insurance Commission. Generally it is further provided that the members must maintain the bureau rates unless they file advance notice of a deviation or variation from a bureau rate with the bureau and the Commission. This deviation must be uniform and applicable to all risks of essentially the same hazard in the class for which the variation is made. In some States, no deviation becomes effective until approved by the State Commission, and in some, the deviation must be made effective for not less than a year.

The necessity from the public viewpoint of maintaining adherence to *uniform* premium rates covering like hazards promulgated through rating bureaus is not only demon-

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[1] 1911 Report of Illinois Fire Insurance Commission to Legislature, p. 48.

strated by the legislation above mentioned, but is also recognized and enforced by the courts. Illustrative is the case of *Northwestern Nat. Ins. Co.* v. *Mortensen*, 230 Wis. 377, 284 N. W. 13 (Sup. Ct. Wis. 1939), wherein the courts of Wisconsin refused to enjoin, at the request of the plaintiff insurance company, the threatened revocation of its license for failure to comply with the fire insurance rate act—though all that the company had done was to charge a lower premium than that fixed for the hazard in question by the rating bureau of which it was a member.

Status of rating bureaus at present: Twenty-eight States today provide by statute for rating bureaus,[1] authorizing or requiring fire insurance companies to be members thereof. Only two States—Nebraska and Iowa—prohibit them. Of the seventeen States still having anti-compact laws on their

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[1] Arkansas, Pope's Dig. of Ark. Stat. (1937), Vol. 2, Sec. 7722; Colorado, Colo. Stat. Ann. (1935), Vol. 3, Ch. 87, Sec. 146; Idaho, Idaho Code Ann. (1932), Vol. 2, Sec. 40-1601; Illinois, Ill. Rev. Stat. (1943), Ch. 73, Sec. 1044; Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Sec. 39-4310 (a); Kansas, Gen. Stat. of Kan. (1935), Sec. 40-922; Kentucky, Baldwin's Rev. Stat. of Ky. (1942), Sec. 298.240; Louisiana, Dart's La. Stat. Ann. (1939), Vol. 3, Sec. 4222; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.52; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Sec. 3606; Mississippi, Miss. Code of 1930, Vol. 2, Sec. 5303; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5972; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Sec. 17:29-6; New Mexico, N. M. Stat. Ann. (1941), Vol. 5, Sec. 60-610; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 181; North Carolina, Michie's N. C. Code (1939), Sec. 6388; North Dakota, Ch. 152 of Laws of 1929, Sec. 1; Ohio, Page's Ohio Gen. Code, Vol. 6, Sec. 9592-1; Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-1605(1); Pennsylvania, Purdon's Pa. Stat. (Perm. Ed.), Title 40, Sec. 692; South Carolina, S. C. Code (1942), Vol. 4, Sec. 8008; South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.3701; Vermont, Public Laws of Vt. (1933), Sec. 7118; Virginia, Michie's Va. Code (1942), Sec. 4314(1); Washington, Remington's Revised Stat. of Wash. Ann. (1932, 1940 Supp.), Vol. 8, Sec. 7119; West Virginia, Michie's W. Va. Code (1943), Vol. 1, Sec. 3370; Wisconsin, Wis. Stat. (1939), Sec. 203.33; Wyoming, Wyo. Rev. Stat. (1931), Sec. 57-216(1).

books[1] eleven[2] have restricted such laws by permitting or requiring cooperative rate making through rating bureaus.

The statutes of twenty-nine[3] States provide either that premium rates must be filed with the State Insurance Department, or that the State Insurance Department may require such filing. The usual provision is that companies may not deviate from the filed rates unless a formal deviation is filed with or approved by the State Insurance Department.

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[1] See pp. 35-36, *supra*, of this brief.

[2] Arkansas, Pope's Dig. of Ark. Stat. (1937), Vol. 2, Sec. 7722; Kansas, Gen. Stat. of Kan. (1935), Sec. 40-922; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.52; Louisiana, Dart's La. Stat. (1939), Vol. 3, Sec. 4222; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5972; Ohio, Page's Ohio Gen. Code, Vol. 6, Sec. 9592-1; Oregon, Ore. Comp. Laws. Ann. (1940), Vol. 7, Sec. 101-1605(1); South Carolina, S. C. Code (1942), Vol. 4, Sec. 8008; South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.3701; Washington, Remington's Rev. Stat. of Wash. (1932, 1940 Supp.), Vol. 8, Sec. 7119; Wisconsin, Wis. Stats. (1939), Sec. 203.33.

[3] Arkansas, Pope's Dig. of Ark. Stat. (1937), Vol. 2, Secs. 7722, 7732; Colorado, Colo. Stat. Ann. (1935), Vol. 3, Ch. 87, Secs. 151, 154; Idaho, Idaho Code Ann. (1932), Vol. 2, Sec. 40-1608; Illinois, Ill. Rev. Stat. (1943), Ch. 73, Secs. 1041, 1049; Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Secs. 39-4310(c), 39-4310(j); Kansas, Gen. Stat. of Kan. (1935), Sec. 40-911; Kentucky, Baldwin's Rev. Stat. of Ky. (1942), Secs. 298.260, 298.270(2); Louisiana, Dart's La. Stat. (1939), Vol. 3, Secs. 4222, 4239; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Secs. 24.57, 24.60; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Secs. 3604, 3605; Mississippi, Miss. Code of 1930, Vol. 2, Secs. 5303, 5313; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5974; Nevada, Nev. Comp. Laws (Supp. 1931-41), Vol. 1, Sec. 3656.121; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Sec. 17:29-6; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Secs. 184(1), 184(6); North Carolina, Michie's N. C. Code (1939), Sec. 6390; Ohio, Page's Ohio Gen. Code, Vol. 6, Secs. 9592-6, 9592-9; Oklahoma, Okla. Stat. (1941), Title 36, Sec. 132; Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-1605(8); Pennsylvania, Purdon's Pa. Stat. (Perm. Ed.), Title 40, Secs. 692, 695; South Carolina, S. C. Code (1942), Vol. 4, Secs. 8003, 8006; South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.3701; Tennessee, Michie's Tenn. Code (1938), Sec. 6177; Vermont, Public Laws of Vt. (1933), Sec. 7118; Virginia, Michie's Va. Code (1942), Secs. 4314(8), 4314(4); Washington, Remington's Rev. Stat. of Wash. Ann. (1932, 1940 Supp.), Vol. 8, Sec. 7118;

Status of rating bureaus in States of indictment: Of the six States named in the indictment:

Virginia[1] requires all fire insurance companies to be members of a rating bureau organized pursuant to a Virginia statute. Bureau rates, deviations therefrom, schedules, rating methods, rules, agreements and regulations must be approved by the Virginia Insurance Department, which has the right to order reductions in rates. It also has the power to order any discrimination removed.

North Carolina[2] requires every rating bureau to file with the Insurance Department every schedule of rates and such other information concerning rates as may be requested, and also requires every rating bureau to furnish to any property owner full information as to the rate applicable to his property. The Insurance Department is empowered to ascertain and find whether any established rate is excessive or unfair.

South Carolina[3] permits every fire insurance company to maintain or be a member of a rating bureau which must admit to membership any licensed fire insurance company. The Insurance Department has the power to require every rating bureau to file with it information regarding its organization, maintenance and operation, as well as schedules, rates, forms, rules and regulations. The Insurance Commissioner is directed to examine a rating bureau at least once every three years, and has the power to order a reduction of rates.

West Virginia, Michie's W. Va. Code (1943), Vol. 1, Secs. 3372, 3377; Wisconsin, Wis. Stat. (1939), Secs. 203.42, 203.41; Wyoming, Wyo. Rev. Stat. (1931), Secs. 57-216(6), 57-216(9).

[1] Michie's Va. Code (1942), Secs. 4222 and 4314.

[2] Michie's N. C. Code (1939), Secs. 6388-94.

[3] S. C. Code (1942), Vol. 4, Secs. 8003-19.

Rating bureaus are permitted to operate in the States of Florida, Georgia and Alabama, although there are no specific statutes providing therefor. Alabama, in 1923, repealed a statute forbidding membership in a rating bureau.[1] The Supreme Court of Florida has upheld the operation of the Florida Rating Bureau (*Brock* v. *Hardie*, 114 Fla. 670, 154 So. 690 (1934)).

Anti-rebate and anti-discrimination statutes: As part of the general program to establish *uniformity* of fire insurance rates as contrasted with *fluctuating rates* due to competitive pressures, the States have enacted anti-rebate and anti-discrimination statutes.

At the present time forty-four States,[2] including Vir-

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[1] Ala. L. 1923, No. 359.

[2] Alabama, 1940 Code of Ala., Title 28, Sec. 75; Arizona, Ariz. Code Ann. (1939), Vol. 4, Sec. 61-331; California Ins. Code (1937), Sec. 750; Colorado, Colo. Stat. Ann. (1935), Vol. 3, Ch. 87, Sec. 70; Connecticut, Gen. Stat. of Conn. (1930), Sec. 4144; Delaware, Rev. Code of 1935, Ch. 20, Art. 2, Sec. 24; Florida, Fla. Stat. (1941), Sec 625.19; Georgia, Ga. Code (1933), Sec. 56-218; Idaho, Idaho Code Ann. (1932), Vol. 2, Sec. 40-1107; Illinois, Ill. Rev. Stat. (1943), Ch. 73, Sec. 763; Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Sec. 39-5030; Iowa, Code of Iowa (1939), Sec. 8666; Kansas, Gen. Stat. of Kan. (1935), Sec. 40-917; Kentucky, Baldwin's Rev. Stat. of Ky. (1942), Sec. 298.230(1); Louisiana, Dart's La. Stat. (1939), Vol. 3, Sec. 4228; Maine, Rev. Stat. of Maine (1930), Ch. 60, Sec. 130; Maryland, Flack's Ann. Md. Code (1939), Vol. 2, Art. 48A, Sec. 45; Massachusetts, Michie's Ann. Laws of Mass., Vol. 5, Ch. 175, Sec. 182; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.170; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Sec. 3766; Mississippi, Miss. Code of 1930, Vol. 2, Sec. 5319; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5979; Montana, Rev. Code of Mont. (1935), Vol. 3, Sec. 6121; Nebraska, Comp. Stat. of Neb. (1929), Sec 44-1105; Nevada, Nev. Comp. Laws (Supp. 1931-41), Vol. 1, Sec. 3656.45; New Hampshire, Rev. Laws of N. H. (1942), Vol. 2, Ch. 323, Sec. 38; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Secs. 17:29-1, 17:29-2; New Mexico, N. M. Stat. Ann. (1941), Vol. 5, Sec. 60-704; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 188; Ohio, Page's Ohio Gen. Code, Vol. 6, Sec. 9589-1; Oklahoma, Okla. Stat. (1941), Title 36, Sec. 149; Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-143; Pennsylvania, Purdon's Pa. Stat. (Perm. Ed.), Title 40, Secs.

ginia, South Carolina, Georgia, Alabama and Florida, prohibit rebating any part of a fire insurance premium or giving an assured any advantage not specified in the policy.

Thus, one means of evading by indirection the general requirement of rate uniformity is checked.

Thirty-seven States,[1] including Virginia, North Carolina and South Carolina, have anti-discrimination statutes for-

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275, 471; Rhode Island, Gen. Laws of R. I. (1938), Ch. 157, Sec. 1; South Carolina, S. C. Code (1942), Vol. 4, Sec. 7994; South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.1103(4); Tennessee, Michie's Tenn. Code (1938), Sec. 6133, Texas, Vernon's Texas Civ. Stat., Vol. 14, Sec. 4894; Utah, Utah Code Ann. (1943), Vol. 3, Sec. 43-3-32; Vermont, Public Laws of Vt. (1933), Sec. 7061; Virginia, Michie's Va. Code (1942), Sec. 4222c; Washington, Remington's Rev. Stat. of Wash. Ann. (1932), Vol. 8, Sec. 7077; West Virginia, Michie's W. Va. Code (1943), Vol. 1, Sec. 3299; Wisconsin, Wis. Stat. (1939), Sec. 201.53(2).

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[1] Arkansas, Pope's Digest of Ark. Stat. (1937), Vol. 2, Sec. 7728; Colorado, Colo. Stat. Ann. (1935), Vol. 3, Ch. 87, Sec. 153; Delaware, Rev. Code of 1935, Ch. 20, Art. 2, Sec. 24; Idaho, Idaho Code Ann. (1932), Vol. 2, Sec. 40-1605; Illinois, Ill. Rev. Stat. (1943), Ch. 73, Sec. 1042; Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Sec. 39-4310(i); Iowa, Code of Iowa (1939), Sec. 8666; Kansas, Gen. Stat. of Kan. (1935), Sec. 40-917; Kentucky, Baldwin's Rev. Stat. of Ky. (1942); Sec. 298.270(1); Louisiana, Dart's La. Gen. Stat. (1939), Vol. 3, Sec. 4228; Maryland, Flack's Md. Ann. Code (1939), Vol. 2, Art. 48A, Sec. 45; Massachusetts, Michie's Ann. Laws of Mass., Vol. 5, Ch. 175, Sec. 104; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.59; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Sec. 3605; Mississippi, Miss. Code of 1930, Vol. 2, Sec. 5310; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5977; Montana, Rev. Code of Mont. (1935), Vol. 3, Sec. 6121; Nebraska, Comp. Stat. of Neb. (1929), Sec. 44-1107; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Sec. 17:29-6; New Mexico, N. M. Stat. Ann. (1941), Vol. 5, Sec. 60-704; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 183(1)(c); North Carolina, Michie's N. C. Code (1939), Sec. 6391; North Dakota, Comp. Laws of N. D. (Supp. 1913-25), Ch. 18, Sec. 4922; Ohio, Page's Ohio Gen. Code, Vol. 6, Sec. 9592-8; Oklahoma, Okla. Stat. (1941), Title 36, Sec. 138; Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-1605(5); Pennsylvania, Purdon's Pa. Stat. (Perm. Ed.), Title 40, Sec. 696; South Carolina, S. C. Code (1942), Vol. 4, Sec. 8005;

bidding the making of any rate which discriminates unfairly between risks in the application of like charges and credits or between risks of essentially the same hazard.

Similarly, this type of legislation, by imposing limitations on bargaining, serves to attain the goal of rate uniformity.

Compulsory increases in rates: Six States have also sought to remove the evils of competitive practices by giving specific power to their Insurance Commissioners to compel *increases* in rates if found to be *inadequate* and to refuse to approve deviations from rating bureau rates where the proposed rates are believed to be *inadequate.*[1] In two States,[2] the Commissioner is directed to revoke the license of any fire insurance company which precipitates or aids in conducting a rate war.

Uniform policies: In further promotion of the general program of curtailing competition, the States have established uniform fire insurance policies. Beginning in

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South Dakota, S. D. Code (1939), Vol. 1, Sec. 31.3702; Tennessee, Michie's Tenn. Code (1938), Sec. 6176; Utah, Utah Code Ann. (1943), Vol. 3, Sec. 43-3-33; Vermont, Pub. Laws of Vt. (1933), Sec. 7121; Virginia, Michie's Va. Code (1942), Sec. 4314(9); Washington, Remington's Rev. Stat. of Wash. Ann. (1932-1940 Supp.), Vol. 8, Sec. 7119a; West Virginia, Michie's W. Va. Code (1943), Vol. 1, Sec. 3377; Wisconsin, W's. Stat. (1939), Sec. 203.37(1); Wyoming, Wyo. Rev. Stat. (1931), Sec. 57-216(3).

[1] Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Section 39-4310(i); Kansas, Gen. Stat. of Kans. (1935), Sec. 40-913; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.51; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 186(2); Oklahoma, Okla. Stat. (1941) Tit. 36, Sec. 134; Washington, Remington's Rev. Stats. of Wash. Ann. (1932, 1940 Supplement), Vol. 8, Sec. 7119a.

[2] Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-1610; Washington, Remington's Rev. Stats. Wash. Ann. (1932), Vol. 8, Sec. 7157.

1873 in Massachusetts,[1] followed by Michigan in 1881[2] and New York in 1886,[3] the States; by statutes or regulations of insurance departments, have standardized fire policies and forms of coverage.

Today, thirty-one States,[4] including the States of Virginia, North Carolina and Georgia, prescribe standard forms of policies which must be used.

Unfair competition: The States have of course, by statute and common law, supplemented their general curtailment of fire insurance competition with specific condemnation of so-called "unfair competition". Boycott and dis-

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[1] Mass. L. 1873, Chap. 331, Secs. 1 and 2.

[2] Mich. L. 1881, No. 149.

[3] N. Y. L. 1886, Chap. 488.

[4] Arizona, Ariz. Code Ann. (1939), Vol. 4, Sec. 61-501; California, Calif. Ins. Code (1937), Sec. 2070; Connecticut, Gen. Stat. of Conn. (1930), Sec. 4159; Georgia, Ga. Code (1933), Sec. 56-810; Idaho, Idaho Code Ann. (1932), Vol. 2, Sec. 40-1401; Illinois, Ill. Rev. Stat. (1943), Ch. 73, Sec. 1009; Iowa, Code of Iowa (1939), Sec. 9017; Louisiana, Dart's La. Gen. Stat. (1939), Vol. 3, Sec. 4044; Maine, Rev. Stat. of Maine (1930), Ch. 60, Sec. 4; Massachusetts, Michie's Ann. Laws of Mass. (1933), Vol. 5, Ch. 175, Sec. 99; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.422; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Sec. 3512; Nebraska, Neb. Comp. Stat. (1929), Sec. 44-601; Nevada, Nev. Comp. Laws (Supp., 1931-41), Vol. 1, Sec. 3656.117; New Hampshire, Rev. Laws of N. H. (1942), Vol. 2, Ch. 326, Secs. 1, 2; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Sec. 17:36-3; New Mexico, N. M. Stat. Ann. (1941), Vol. 5, Sec. 60-608; New York, McKinney's Cons. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 168; North Carolina, Michie's N. C. Code (1939), Sec. 6436; North Dakota, Comp. Laws of N. D. (1913), Ch. 79, Sec. 6625, as amended by Ch. 154, Laws of 1935; Oklahoma, Okla. Stat. (1941), Title 36, Sec. 243; Oregon, Ore. Comp. Laws Ann. (1940), Vol. 7, Sec. 101-1801; Pennsylvania, Purdon's Pa. Stat. (Perm. Ed.), Title 40, Sec. 657; Rhode Island, Gen. Laws of R. I. (1938), Ch. 154, Sec. 1; South Dakota, S. D. Code of 1939, Vol. 1, Sec. 31.2401; Texas, Vernon's Tex. Civ. Stat., Vol. 14, Sec. 4888; Virginia, Michie's Va. Code (1942), Sec. 4305a; Washington, Remington's Rev. Stat. of Wash. Ann. (1932), Vol. 8, Sec. 7152; West Virginia, Michie's W Va. Code (1943), Vol. 1, Sec. 3366; Wisconsin, Wis. Stat. (1939), Sec. 203.06; Wyoming, Wyo. Rev. Stat. Ann. (1931), Sec. 57-218.

paragement of other companies, not ancillary to lawful cooperative action, are prohibited—as is pointed out by the Government (pp. 131, 133).[1]

In short, the States have covered all phases of fire insurance alleged in the indictment herein—not only the cooperative determination of rates—but in addition all other acts alleged to be incident thereto which the Government has termed boycott and disparagement.

District of Columbia regulations: With its unlimited power to legislate for the District of Columbia, Congress has evidenced complete agreement with the States in their efforts to curtail competition, eliminate discrimination and establish premium uniformity.

In 1900, the House, in a bill for regulating fire insurance in the District of Columbia[2] adopted a clause prohibiting combinations fixing premium rates; the bill was never approved by the Senate.

In fact, in *Lown* v. *Underwriters' Association,* C. C. H. Fed. Trade Reg. Serv., Par. 6128 (Sup. Ct. D. C. 1915), the Supreme Court of the District held that the Sherman Act did not prohibit fire insurance companies from jointly fixing premium rates for the District.

Further, on April 22, 1943, Senator McCarren introduced a bill in the Senate[3] to provide for regulation of insurance rates in the District. Section 4 of the bill specifies that fire insurance companies authorized to do business in the District shall organize a rating bureau in which membership is mandatory. The rating bureau is to have the power to promulgate rates but no such rate shall be charged or en-

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[1] Cf. *Atlanta Association of Fire Insurance Agents* v. *McDonald,* 181 Ga. 105, 181 S. E. 22 (1935).

[2] H. R. 9283, 33 Cong. Rec. 3641, 3655; 33 Cong. Rec. 3667.

[3] Senate Bill 1029, 78th Cong., 1st Sess. 1943.

forced in the District by either the rating bureau or any member thereof until it shall have first been filed with and approved by the Superintendent. While companies may deviate from such rates, they must first file the deviation with the rating bureau and the Superintendent, and such deviation must be approved by the latter.

This bill was reported out favorably by the Senate Committee for the District of Columbia under date of November 12, 1943.

Congress also has enacted for the District anti-discriminatory and anti-rebate laws.[1]

European regulations: It may be of interest to note that in England one association of practically all companies for the making of fire insurance rates has existed since 1858, and the same situation generally prevails on the Continent.[2]

Effectiveness of regulation:[3] For the most part this State regulation described above has been signally effective in achieving the objectives of curtailing competition, without at the same time permitting the fire insurance companies to charge excessive rates.

Thus the average premium rate for the United States

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[1] D. C. Code 1940, Sec. 35-1333.

[2] Riegel, *Fire Underwriters Association in the United States* (1916), p. 69.

[3] To show the contrary, the Government (pp. 118-119) refers to a tabulation (89th Cong. Rec. Dec. 9, 1943) A 5777, admittedly prepared by an economist for the Department of Justice for use in the instant case, based upon figures taken from the confidential files of that Department without revelation as to the sources of information from which the tabulation was made. (Joint hearing before Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362, H. R. 3269 and H. R. 3270, pp. 142, 683, 684, 709 and 713.)

This tabulation merely covers the northeastern area of the United States (*Ibid.*, p. 712) and defendants strongly protest its use since, without disclosure of the source of the figures, it is in the nature of a self-serving declaration depriving the defendants of an opportunity to examine that source and controvert those figures.

dropped from $1.15 per $100, for the ten years 1900 to 1909, to $.61 in 1942, a reduction of nearly 50%.[1]

Furthermore the stock fire and marine insurance companies showed an average underwriting profit on their capital, subject to the risk of business, of only 2.9% for the years 1935 to 1939, inclusive.[2]

The States can and do control fire insurance profits. To illustrate—twenty six States provide statutory methods for the specific purpose of eliminating unreasonable rates.[3] Of these, twelve States by statute specifically authorize the Insurance Commissioner to order a reduction in rates if the companies have made an underwriting profit in excess of 5% or of a reasonable amount.[4]

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[1] The Weekly Underwriter "Record of Fire Insurance by States for 1942" (1943), p. 124.

[2] Joint hearings before Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362, H. R. 3269 and H. R. 3270, pp. 691-694.

[3] Illinois, Ill. Rev. Stat. (1943), Ch. 73, Sec. 1042; Massachusetts, Michie's Ann. Laws of Mass., Vol. 5, Ch. 175, Sec. 104; Michigan, Mich. Stat. Ann. (1937), Vol. 17, Sec. 24.51; Minnesota, Mason's Minn. Stat. (1927), Vol. 1, Sec. 3609; Nevada, Nev. Comp. Laws (Supp. 1931-41), Vol. 1, Sec. 3656.137; New Hampshire, Rev. Laws of N. H. (1942), Vol. 2, Ch. 321, Sec. 16; New Jersey, Rev. Stat. of N. J. (1937), Vol. 1, Sec. 17:29-8; New York, McKinney's Consol. Laws of N. Y. Ann. (1940), Vol. 27, Sec. 186(2); North Carolina, Michie's N. C. Code (1939), Sec. 6393; Oklahoma, Okla. Stat. (1941), Title 36, Sec. 134; Texas, Vernon's Tex. Civ. Stat., Vol. 14, Sec. 4878; Vermont, Pub. Laws of Vt. (1933), Sec. 7126; Washington, Remington's Rev. Stat. of Wash. Ann. (1932-1940 Supp.), Vol. 8, Sec. 7119c; Wisconsin, Wis. Stat. (1939), Sec. 203.38; plus the statutes listed in footnote 4 below.

[4] Arkansas, Pope's Dig. of Ark. Stat. (1937), Vol. 2, Sec. 7730; Colorado, Colo. Stat. Ann. (1935), Vol. 3, Ch. 87, Sec. 157; Indiana, Burn's Ind. Stat. Ann. (1933, 1940 Replacement), Vol. 8, Sec. 39-4310(1); Kansas, Gen. Stat. of Kan. (1935), Sec. 40-913; Kentucky, Baldwin's Rev. Stat. of Ky. (1942), Sec. 298.290; Louisiana, Dart's La. Stat. (1939), Vol. 3, Sec. 4230; Mississippi, Miss. Code of 1930, Vol. 2, Sec. 5311; Missouri, Mo. Rev. Stat. Ann. (1939), Vol. 15, Sec. 5984; South Carolina, S. C. Code (1942), Vol. 4, Sec. 8016; Virginia, Michie's Va. Code (1942), Sec. 4314(9); West Virginia, Michie's W. Va. Code (1943), Vol. 1, Sec. 3379(d); Wyoming, Wyo. Rev. Stat. (1931), Sec. 57-217.

Theory behind State curtailment of competition.

Fundamentally of course the rationale of this State curtailment of competition has been that insurance has been found to differ sharply from other business.

The public interest in forbidding restraints on free competition was based upon the conception of buyers competing among themselves on one side and sellers on the other, so that free play could be given to the law of supply and demand. It involved the idea of a market in which prices can best be determined by unrestrained competition and are not primarily dependent upon a factor which is beyond the control of competition. This view ignored any interest in the seller on the part of the public or of the buyers after the marketing transaction had taken place. It was accepted as a necessary consequence that marginal sellers would be eliminated through bankruptcy.

The States found the public interest in insurance, however, to be vastly different. Fire insurance is in essence a means by which the risk of loss by fire is distributed according to the hazards, as determined by experience and the law of averages. The public interest accordingly lies in causing each assured to contribute according to the hazard to which his property is subject, determined to the extent possible with scientific accuracy rather than by the process of bargaining between the insurer and the assured. Since any deficiency in the contribution of one assured must be made good by that of others, mere competitive bargaining between insurer and one assured, which gives that assured a rate lower than that called for by the hazards involved, has the result of increasing the rates applicable to others and violating the principles on which the structure of fire insurance is based.

The States, moreover, found insurance to require different treatment in that the public had an interest in the sol-

vency of the insurers. If a premium rate is too low it endangers the protection of all assureds. An assured does not end his relationship with the insurer upon the issuance of a policy. He has a continuing interest in the solvency and well-being of the insurer, as he pays *now* for performance in the *future*—and he cannot obtain performance from an insolvent. Accordingly, the States came to favor reinsurance and other agreements between the fire insurance companies, providing for the sharing of risks at fixed rates.

The essential difference between fire insurance and commercial transactions of the market place, as discovered by the States, was pointed out by Mr. Justice McKenna in *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, as follows:

> "We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. *How necessary their solvency is, is manifest.* • • • It is therefore, essentially different from ordinary commercial transactions • • •" (pp. 414-5).

The Government indeed expressly concedes in its brief that:

> "• • • we agree that a first requisite in the insurance business is the soundness of the companies.

> And it may be that completely unrestricted competition among insurance companies, as among railroads, would be harmful to the public" (p. 119).

Judicial approval of State curtailment of competition.

Beyond question this comprehensive State regulation, which encourages *cooperation* rather than *competition* in fire insurance, is diametrically opposed to the Sherman Act. To illustrate, with respect to premiums—

> (1) The States permit or require cooperation in rate determination. The Sherman Act, however, forbids this. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150.
>
> (2) The States permit or require adherence to published rates. The Sherman Act, however, frowns on this. *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553.
>
> (3) The States permit or require action discouraging rate cutting. The Sherman Act, however, condemns this. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373.

As observed in the Merritt Committee Report, in contrasting State regulation with anti-compact laws dealing with fire insurance:

> "It is interesting to observe, however, how entirely the principle of State regulation is opposed to the principle of anti-compact. Under anti-compact, a premeditated and enforced uniformity of rates was prohibited while under State regulation the effect, either by statute or in actual practice, is to secure absolute uniformity. The anti-compact laws in effect made it possible to 'bargain' and the result was gross discrimination; under State regulation bargaining and discrimination are impossible" (p. 51).

This comprehensive State regulation, while opposed to the Sherman Act, nevertheless has been repeatedly upheld by this Court. The following cases are illustrative of the numerous holdings approving State curtailment of competition in fire insurance:

(1) *German Alliance Insurance Company* v. *Kansas*, 233 U. S. 389, upholds the right of the State to regulate insurance rates.

(2) *O'Gorman and Young, Incorporated* v. *Hartford Fire Insurance Company*, 282 U. S. 251, upholds the right of the State to regulate agents' commissions.

(3) *Osborn et al.* v. *Ozlin et al.*, 310 U. S. 53, upholds State legislation of Virginia requiring insurance policies with respect to property within that State to be executed through resident agents, and fixing the commissions payable to those agents.

(4) *Hoopeston Canning Co. et al.* v. *Cullen*, 318 U. S. 313, holds that fire insurance is of such peculiarly local character that a State can regulate a reciprocal fire insurance association even though its contracts are entered into outside the State if they relate to property within its borders.

In thus upholding State curtailment of competition in fire insurance, this Court frankly acknowledges that free competition—the purpose of the Sherman Act—may be and has been dispensed with legally by the several States.

This is emphasized by Mr. Justice Frankfurter in *Osborn et al.* v. *Ozlin et al.*, 310 U. S. 53:

> "Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life *have long been withdrawn from the benefits and caprices of free competition.* The state may fix insurance rates, *German Alliance Ins. Co.*

> v. *Lewis*, 233 U. S. 389; it may regulate the compensation of agents, *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; it may curtail drastically the area of free contract, *National Ins. Co.* v. *Wanberg*, 260 U. S. 71" (pp. 65-66).

Threatened nullification of State regulation.

If insurance is held to be "commerce" within the meaning of the Sherman Act, this State curtailment of competition calculated to encourage and establish uniform rates necessarily would fall because of its essential inconsistency with that Federal statute.

The Government has conceded (p. 126) the application to such State regulation of the principle recently enunciated by this Court in *Cloverleaf Co.* v. *Patterson*, 315 U. S. 148, as follows:

> "• • • where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application" (p. 156).

The principal case cited by the Government on State regulation, namely *Parker* v. *Brown*, 317 U. S. 341, itself declares that such regulation—if inconsistent with the Sherman Act and applicable to interstate commerce—is rendered nugatory by that Act:

> "• • • a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" (p. 351).

Thus, in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, for example, State approved price agreements were declared:

> "• • • so far as interstate commerce was affected, invalid under the Sherman Anti-Trust Act" (p. 188).

If fire insurance is held to be interstate "commerce" within the meaning of the Sherman Act certainly the basic objectives of State regulation, namely, the power to control insurance companies through licensing, inspection and requirements for reserves and the power to compel or encourage uniformity in premium rates, will cease.

That the States' ability to exercise detailed control of insurance companies will terminate, upon such an event, is shown among other decisions by the following:

Crutcher v. *Kentucky*, 141 U. S. 47;
International Textbook Company v. *Pigg*, 217 U. S. 91;
Adams Express Co. v. *New York*, 232 U. S. 14;
Furst and Thomas v. *Brewster et al.*, 282 U. S. 493;
Bingaman v. *Golden Eagle Western Lines, Inc.*, 297 U. S. 626.

State regulation, it should be clearly understood, is no half-hearted or piecemeal control of fire insurance. All phases—rates, commissions, cooperation, discrimination, rules, policies, taxation, reports, reserves, investments, and dividends—are covered in detail in one comprehensive program.

If fire insurance is interstate commerce, as asserted by the Government, this comprehensive and drastic regulation of all phases of that commerce cannot stand. Isolated provisions may escape destruction; but any State program to regulate interstate commerce broadly must fall.

Baldwin v. *G. A. F. Seelig*, 294 U. S. 511;
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282;
Lemke v. *Farmers Grain Co.*, 258 U. S. 50;
Shafer v. *Farmers Grain Co.*, 268 U. S. 189.

This Court in *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, cited by the Government in its brief, emphasized that State regulation of any comprehensive nature must be restricted to local matters:

> "• • • remotely affecting and wholly unrelated to interstate commerce" (p. 353).

That State fire insurance regulation must fall if such insurance is commerce was clearly recognized in the leading case of *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, as follows:

> "To reverse the cases, • • • would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws" (p. 502).
>
> "• • • If insurance is commerce and becomes interstate commerce whenever it is between citizens of different States, *then all control over it is taken from the States and the legislative regulations which this court has heretofore sustained must be declared invalid*" (p. 509).

Louisiana, speaking through its Insurance Commission on October 7, 1943,[1] with reference to the decision herein of the lower court, accurately summarized the effect on State regulation as follows:

> "Unquestionably, a reversal of the district court decision in those cases by the United States Supreme Court would, in effect, nullify all State legislation providing for the establishment and maintenance of

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[1] Letter of Louisiana Insurance Commission to Senator Van Nuys, Joint Hearing before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362 and H. R. 3269, 3270, p. 240.

uniform rates and coverages under local control and supervision. And such result, it is submitted, is not desired, either by the public, or the insurance companies or State officials, all of whom are decidedly well satisfied with the very favorable results produced by State regulation and are, in addition, unalterably opposed to further encroachment by the Federal Government on States' rights, which the permitted extension of the antitrust laws in this case would constitute."

To sustain the instant indictment and thus invalidate State curtailment of competition would destroy, by a single stroke, the result of years of State experience demonstrating that stability rather than competition in rate making best serves the public interest.

Authorities cited by Government.

The discussion of the Government on State regulation adds little.

What laws nullified: The Government primarily urges that—while the Sherman Act will nullify inconsistent State regulation, if fire insurance is held to be commerce under the Sherman Act—nevertheless some of the State regulation will be saved.

The grave doubts which the Government expresses on this matter, however, demonstrate the weakness of this Government contention.

(a) The Government generally claims in most guarded language that "We think it not improbable" that the rating bureaus, minus certain functions, "might" still operate (p. 120), that this Court will have to pass on the State regulation "in accordance with" the "relevant facts and circumstances" (p. 125), and that "to the

extent" the insurance cases recognize the need for local regulation they "may" still be given effect (pp. 125-6).

(b) The Government then specifically admits that the Sherman Act "would" apply to set aside regulations of five States (p. 130), asserts that whether the Act would apply to eleven more "might" depend upon how the rates were established (pp. 130-131) and finally can only suggest that regulations of five other States "might" well be upheld (p. 130).

Effect of nullification: The Government next discusses what the effect would be if State regulation were nullified by the Sherman Act. In this discussion, however, the Government takes diametrically opposing positions.

On the *one* hand the Government argues that the nullification of State regulation would do no harm, because the rating bureaus and attendant cooperative action are harmful to the public.

It cites Insurance Commissioners Pink of New York and De Celles of Massachusetts, and certain other writers, as critical of these bureaus (pp. 113-114).

Further reading of these writers, however, reveals that they are very much in favor of the continued operation of such bureaus.

Pink, *The Problem of Fire Rates* (1942), cited by the Government, for example states:

> "It is strange that after we have made so much progress over so many years with the difficult art of rating that there should be anyone to question the advisability of rating organizations in the fire field. It would seem that the effort should be, not to destroy the company rating organizations, but to make rating more efficient and more responsive to changing conditions. There can be no intelligent or systematic

> fixing of premiums unless there are rating organizations which collect adequate statistics and use the experience in proposing fire rates for the industry" (p. 2).

De Celles, *The Legal Aspects of Insurance Cost and Coverage* (1936), cited by the Government, similarly states:

> "Please do not misunderstand my position. I am not against the rating bureau. The bureau is the most efficient method of making rates. It combines into one group the various ideas of hundreds of companies" (p. 13).

On the *other* hand the Government argues that the nullification of State regulation would do no harm, because the rating bureaus and attendant cooperative action could continue with the Department's blessing.

The Government concedes that the first requisite in fire insurance is the solvency of the companies (p. 119). It then offers a Departmental-approved modification of the Sherman Act to permit "a large area in which insurance companies may cooperate" and assures the defendants that the Government will not "take issue" with them if they act within that area (pp. 109-110, 119, *et seq.*).

This suggestion that the Department can authorize these practices if the Sherman Act is applicable, however, is without merit.

It is perfectly apparent that the basic principle of the Sherman Act is diametrically opposed to the principles on which State regulation is based. The Sherman Act is intended to require free and unrestricted competition. In enforcing that Act it has been the principle of the Government authorities that price warfare is to be encouraged; that anything which results in stabilization is taboo; that under ordinary conditions, prices should follow a con-

tinuous downward spiral of underbidding; that bankruptcy is the normal and inevitable concomitant of competition required under the Sherman Act.

It has been the policy of the Government under the Sherman Act that anything which pegs, stabilizes, puts a bottom under, or otherwise tampers with the price structure is illegal *per se* under the literal enforcement of the doctrine of the *Madison Oil* case, 310 U. S. 150.

Under these circumstances it is not to be wondered that the defendants are very skeptical indeed of any suggestion that the Department would regard with acquiescence and complacency the continued operation of rating bureaus which might not only compute statistics as to the proper ratio of burning losses, but might even "evaluate" risks containing necessarily elements of judgment. The defendants have good reason to fear that if rating bureaus should prepare such tables and evaluations —and if they were intended to be used and were actually used in any substantial and effective manner, either to determine the proper differentials between different classes of risks or as bottoms below which rates should never go— the Department of Justice and the Federal Trade Commission would treat such action exactly as they have treated other association activities. What assurance could the defendants have that the Government agencies would not immediately move in with the usual charges of—

"Gary dinners"—
"stabilization"—
"tacit understanding"—
"concert of action"—
"price leadership"—
"bodies organized to receive such intimations and act thereon"—
"purpose and effect of limiting competition"—

and other expressions which are the familiar language of trade association cases.

Moreover, there is no merit in the suggestion that tables evaluating burning risk upon an actuarial basis (which is only one factor of fire insurance cost) would of themselves be sufficient—even if generally used—to protect the companies from insolvency. If insolvency is to be avoided, the companies must recover not merely this one factor of their cost but their entire cost, including the cost of doing business and the cost of building up reserves against general conflagrations which lie outside the normal burning loss.

Is there any doubt that the Government would regard agreements not to sell below cost—or any part of cost—as a violation of the Sherman Act? To repeat, the Sherman Act regards bankruptcy as normal.

The States have built up a comprehensive system of legislation based upon exactly the opposite principle—namely, that solvency is the first requisite of any intelligent regulation of insurance—and that unrestricted rate competition is incompatible with solvency.

The application of the Sherman Act would not merely affect that system in minor and unimportant ways. It would cut the very heart out of it.

The State system of regulation herein involved would not be saved by the application of the doctrine of *Parker* v. *Brown*, 317 U. S. 341. That case involved State regulation in conformity with Federal agricultural legislation which expressly contemplated State cooperation in its enforcement. The reliance the Court placed on the harmony in objectives of the State and Federal regulation shows this case to have no value as a precedent where the antithetical objectives of unlimited Federal competition and minute State regulation are involved.

Relevancy of nullification: The Government finally urges that the nullification of State regulation is beside the point here, since the State regulation allegedly does not justify certain of the alleged acts charged against the defendants, namely acts of boycott and disparagement (pp. 132-133).

If the Sherman Act is applied to fire insurance by reason of the alleged boycott and disparagement, however, the Act is applied generally to fire insurance. The Act does not stop with forbidding an alleged boycott—it also forbids cooperative rate determination.

In other words, to apply the Sherman Act to fire insurance in order to reach an alleged boycott means simultaneously to apply the Act to the destruction of State curtailment of competition.

If, in fact, the defendants are guilty of an illegal boycott, the laws of the several States afford adequate means for the punishment of such conduct—as the Government itself points out (pp. 131, 133)—without destruction of an entire regulatory structure based on years of experience.

IV.

This Court Will Unsettle the Law Applicable to Fire Insurance and Expose Defendants To Retroactive Criminal Penalties if it Now Holds That Fire Insurance Is Commerce.

Government argument.

The Government, in requesting this Court to hold that fire insurance is "commerce" within the meaning of the Sherman Act, considers the chaotic effect of such a holding upon the States, the companies and their assureds to be of little or no importance.

It finds no injustice whatever in a demand that this Court sustain the indictment herein by reversing its holdings of 75 years and thus expose all insurers to criminal punishment for uniformity of action permitted or required by State regulation previously upheld by this Court.

Chaotic business conditions.

That the States and the insurance companies will be faced with tremendous problems if the Sherman Act applies to fire insurance, is all too clear. Primarily these problems will arise out of the necessity of determining to what extent the Sherman Act and to what extent State statutes control. Obviously, the companies cannot serve two totally inconsistent masters. They cannot participate in establishing uniform premium rates as required or permitted by the States and still obey the demands of the Sherman Act which would prohibit such cooperative action.

If the indictment is sustained, therefore, chaotic uncertainty inevitably will exist for many years. It will only be after a period of protracted litigation that anyone can tell what, if any, part of State regulation remains valid and enforceable.

That such uncertainty will exist is in effect admitted by the Government in its brief (p. 130). There the Government says "a rate so approved *might well* become the [lawful] act of the state government"; "Whether rates fixed in the latter group would be lawful *might* depend upon how they were established"—and the like.

This uncertainty on the part of the Government illustrates the tremendous uncertainty that will necessarily follow application of the Sherman Act.

If a State, as the result of its experience, chooses to make membership in a bureau mandatory, the companies obeying might or might not be guilty of violating the Sher-

man Act according to the Government. If, on the other hand, the State chooses to give to the companies the option of belonging or not belonging to a rating bureau, the Government thinks that those belonging would clearly violate the Sherman Act.

Hence, to maintain any regulation, the States would have to enter upon a trial and error method, bringing each type of regulation to this Court for ultimate adjudication.

In short, the insurance companies would have no safety zone in which their activities would be clearly legal. If they conducted their business in a manner clearly lawful under the Sherman Act, they would be faced with revocation of their licenses to do business in many States. If they attempted compliance with the State laws, they would face the criminal penalties of the Sherman Act.

New Jersey, speaking through its Insurance Commissioner,[1] has frankly stated that:

> "If the Court should now decide that insurance is commerce or interstate trade an extremely serious situation would at once arise as the business would then be subject to the Sherman and Clayton Acts with which many of the regulatory laws of the several States, including New Jersey, are in direct conflict. This would create a most deplorable situation, causing a serious disruption in the orderly conduct of this business which is of such vital public interest."

Vermont, speaking through its Commissioner of Banking and Insurance,[2] has similarly pointed out:

> "* * * the chaotic condition that will exist should insurance be deemed subject to the Federal anti-trust laws."

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[1] Letter dated October 6, 1943, Joint Hearing before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362 and H. R. 3269, 3270, p. 246.

[2] *Supra*, Note 1, p. 252.

Wisconsin, also speaking through its Commissioner of Insurance,[1] has expressed the same views:

> "To my mind, it would be anomalous in the extreme if insurance companies were compelled to follow the mandate of State statutes, which call for membership in rating bureaus and combined action in the promulgation of forms and other necessary adjuncts of the business of underwriting, and yet be subject to the charge of combining and confederating under Federal antitrust laws by reason of their group observations of State statutes.
>
> "Nothing short of chaos would result in the business were such a condition to obtain."

This confusion will be the more confounded by reason of the necessity for reinsurance and other agreements among fire insurance companies, providing for the sharing of large risks at fixed rates.

Automatic reinsurance, the predominant form today,[2] is a contract by which the reinsurer agrees to assume a fixed portion of the liability the instant the original insurer issues a policy. In return, the reinsurer receives a portion of the premium paid by the assured. Thereby each insurer can issue with safety a policy in any sum or a number of policies covering risks of loss in conflagration centers since its maximum liability thus is limited to predetermined amounts.

This automatic reinsurance, however—so necessary to the financial safety of insurers and so essential to adequate insurance coverage on larger risks—can only exist where the reinsurer knows in advance the premium rate to be received. It will not agree to bear a portion of a risk sight

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[1] Letter dated September 30, 1943, Joint Hearing before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess., on S. 1362 and H. R. 3269, 3270, p. 253.

[2] Golding, The Law and Practice (1937), pp. 41-42.

unseen unless it knows beforehand that the premium rate will afford adequate return for the risk undertaken. This principle of a premium rate agreed upon in advance is the very essence of automatic reinsurance.

If the Sherman Act were held to apply to fire insurance, in place of State regulation, the validity of these agreements—not only as to future contracts—but as to the very large number of contracts now outstanding—would be threatened and fire insurance itself endangered. All such existing agreements might at once become illegal and void.

The doctrine stated by this Court in *National Bank* v. *Whitney*, 103 U. S. 99, in refusing to change an established rule of law because of its effect on the welfare of the community, seems clearly applicable:

> "* * * *The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed.* If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future" (p. 102).

***Ex post facto* penalties.**

Chaotic uncertainty, however, will not be the only effect of holding fire insurance to be commerce within the meaning of the Sherman Act. Retroactive criminal penalties are also involved. To explain—

The fire insurance companies did not ask for State regulation. They fought it strenuously, seeking federal regulation as a substitute. However, Congress consistently refused to act.

This Court, moreover, holding that fire insurance is not commerce but is subject to State regulation, compelled the

fire insurance companies to conform their business activities to such State statutes.

If now the Sherman Act be applied to fire insurance, as sought by the instant indictment, fire insurance companies will be condemned for a uniformity of action expressly sought by the State regulation which this Court compelled them to obey. They will be subjected to penalties, under what might well be termed an *ex post facto* theory of law, for activities which until now were held to be legal.

That such *ex post facto* punishment has never been favored by the courts was stated as early as 1793 by Lord Kenyon, in *Rex* v. *Younger*, 5 T. R. 449, 101 Eng. Reprint 253, as follows:

> "Thirty-four years have nearly passed since the decision of the case of R. *v.* Cox, which informed the public that all bakers have a right to do what is imputed to this defendant as an offence. This circumstance alone ought to have some weight in the determination of this case. It would be cruel not only to the defendant, but also to those in a similar situation with him, if we were now to punish him for doing that which this court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years" (p. 450).

Indeed in view of uniform precedent that fire insurance is not commerce—concurred in both by Congress and the Department of Justice—an interpretation of the Sherman Act now as applicable to fire insurance might well render the language of the Act so vague and uncertain as to be repugnant to the Fifth and Sixth Amendments to the Constitution. That Act would indeed be vague if for over fifty years "commerce" did not include fire insurance but suddenly in January, 1944, it does include such insurance.

This Court has repeatedly held, however, that the Sherman Act is not vague and uncertain—thereby ruling against any such sudden change in the Act's meaning.

No reversal under these conditions.

When faced with consequences far less serious, this Court has refused repeatedly to reverse its established doctrines. Indeed, Mr. Justice McKenna, in *New York Life Insurance Company* v. *Deer Lodge County,* 231 U. S. 495, 502, reaffirming *Paul* v. *Virginia,* applied the rule expressly to insurance—as we have previously shown.

In one of the most recent decisions by this Court, *Helvering* v. *Griffiths,* 318 U. S. 371, the Government asked that *Eisner* v. *Macomber,* 252 U. S. 189, which had held common stock dividends not taxable as income, be reviewed and overruled. The Supreme Court flatly refused, enunciating through Mr. Justice Jackson the following applicable principles:

> "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the Congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the Government" (p. 402).

Similarly, it would be a pity indeed if the fire insurance companies could not rely on like assurance from the same three branches of Government. In fact, their hardship will be even greater if this Court now reverses itself and sustains the instant indictment. They will be exposed to *criminal* punishment for acts which such assurances have led them to believe were legal.

V.

The Power Of Congress To Regulate Fire Insurance Is Not Here At Issue.

Government argument.

Finally the Government argues in its brief that even if fire insurance is not "commerce", nevertheless Congress has power to regulate it under its "commerce power", and that the Sherman Act constitutes an exercise of this power.

The Government states sweepingly that "We have sought to show that • • • the [fire insurance] business • • • is both commerce and interstate commerce. Even if this were not so, however, regulation of the business under the commerce clause would be lawful because of the close economic relation between fire insurance and activities which are unquestionably interstate" (pp. 60-61). According to the Government, "The insurance industry should be subject to federal regulatory power" (p. 67).

The Government further argues that "The words 'trade or commerce', as used in the Sherman Act, were not intended to have a narrower meaning than in the Constitution" (p. 71), that the "Act and Constitution have the same scope" (p. 72), and that it is not unreasonable "to subject the fire insurance industry to the anti-trust laws" (p. 108).

Argument totally irrelevant.

This argument by the Government is not directed to any issues raised by the defendants' challenge of the instant indictment.

It is more a request for an advisory opinion, on strictly theoretical questions, than a defense of the instant indictment. There is, therefore, no need here to do more than point to the irrelevancy of this argument.

Scope of commerce clause not at issue.

The Government is raising a straw issue when it argues that the commerce clause of the Constitution *can* extend to a non-commerce activity such as fire insurance.

The scope of the commerce clause is not at issue here. The Sherman Act alone is involved and its scope is considerably more limited.

A demonstration that Congress *can* regulate fire insurance is not any demonstration that Congress *has* regulated it by the Sherman Act—for Congress through the Sherman Act has not exercised its full power over non-commerce activity.

This is strikingly illustrated by *Apex Hosiery Co.* v. *Leader et al.*, 310 U. S. 469, wherein this Court, through Mr. Justice (now Chief Justice) Stone, held that certain intrastate activity which admittedly "affected" commerce—namely, a sit-down strike causing a cessation of interstate activity—was subject to the commerce clause but was not within the purview of the Sherman Act. These activities held *not* to come within the Sherman Act were described as follows:

> "Here the strikers' activities were as closely related to interstate commerce and *affected* it as substantially as numerous other activities not in themselves interstate commerce *which have nevertheless been held to be subject to federal statutes enacted in the*

> *exercise of the commerce power.* More recently, where the statute was by its terms applicable and the question was of Congressional power, we have sustained the application of the Wagner Act, 49 Stat. 449, 29 U. S. C. §§151-166, regulating labor relations 'affecting' interstate commerce to situations no more closely related to the commerce than these, and where the interstate commerce affected was no greater in volume" (pp. 484-485).

This difference between the scope of Congressional power and its exercise thereof by the Sherman Act (the latter alone being involved here) is further supported by *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, wherein this Court pointedly noted that Congress, in limiting the coverage of the Sherman Act to interstate commerce, while expanding the scope of the National Labor Relations Act to activities "affecting" interstate commerce,[1] thereby had restricted the Sherman Act to a more limited scope:

> "* * * while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sherman Law" (p. 521).

The scope of the commerce power and of an act exercising that power are similar, in reaching local non-commerce activity merely "affecting" interstate commerce,

---

[1] The expanded coverage of the National Labor Relations Act clearly distinguishes *Polish National Alliance* v. *National Labor Relations Board*, 136 F. (2d) 175 (C. C. A. 7th, 1943), now before this Court. That case did not involve the Sherman Act and only by way of dictum did the court state that insurance was "commerce" within the power of Congress to regulate. The court conceded that its holding was not premised upon any ruling that insurance is or is not "commerce":

> *"The fact, if such it be, that insurance is not commerce* or that petitioner is a non-profit organization *no longer requires a contrary conclusion"* (p. 180).

only when Congress expressly so directs. The Sherman Act is barren of any such direction.

As is emphasized in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941), in connection with the Federal Trade Commission Act which likewise uses the word "commerce":

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See for example, National Labor Relations Act, §§2(7), 9(c), 10(a), 49 Stat. 450, 453, 29 U. S. C., §§152(7), 159(c), 160(a); Bituminous Coal Act, §4-A, 50 Stat. 83, 15 U. S. C., §834; Federal Employers' Liability Act, §1, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C., §51" (p. 351).

The irrelevance of the Government's straw issue herein, in confusing Congress' *power* to legislate with its limited exercise in the Sherman Act, is well epitomized in the last cited case:

> "This case presents the narrow question of what Congress *did*, not what it *could do*" (p. 355).

Scope of Sherman Act not at issue.

The Government raises another strictly theoretical or straw issue when it claims that the Sherman Act—whether or not exhausting the commerce power—*can* extend to fire insurance on the theory that although it is not itself commerce fire insurance burdens other commerce.

A demonstration that the Sherman Act can apply to fire insurance on some theory that it burdens *other* commerce is irrevelant in this case, because the court below has squarely held that the indictment charges—not a restraint of *other* commerce—but solely a restraint of *commerce in fire insurance* alone (see *supra*, pp. 2-4 of this brief).

We are of course controlled here by this construction. To refer to illustrative cases:

In *United States* v. *Borden Company et al.*, 308 U. S. 188 (1939), previously cited, it was ruled:

> "This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review" (p. 193).

In *United States* v. *Colgate & Company*, 250 U. S. 300 (1919), this Court went to considerable length to discover the lower court's interpretation of the indictment, but refused to examine the indictment itself, saying:

> "Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act" (p. 306).

In *United States* v. *Yuginovich et al.*, 256 U. S. 450 (1921), this Court similarly ruled:

> "It is well settled that in cases of this character the construction or sufficiency of the indictment is not brought before us. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Stevenson*, 215 U. S. 190. For the purpose of interpreting the statute we adopt the meaning placed upon the indictment by the court below. *United States* v. *Colgate Co.*, 250 U. S. 300" (p. 461).

In *United States* v. *Winslow*, 227 U. S. 202, Mr. Justice Holmes, delivering the opinion of this Court affirming the action of the district court in sustaining a demurrer to the indictment, stressed the same rule:

> "The District Court construed the indictment as confined to the combination of February 7, that is,

> simply to the merger of the companies without regard to the leases subsequently made, 195 Fed. Rep. 592, 594; and we have no jurisdiction to review this interpretation of the indictment. *United States* v. *Patten*, 226 U. S. 525. Hence the only question before us is whether that combination taken by itself was within the penalties of the Sherman Act. The validity of the leases or of a combination contemplating them cannot be passed upon in this case" (pp. 216-217).

In short, as explained by this Court in *United States* v. *Patten*, 226 U. S. 525 (1913):

> "The limitations upon our jurisdiction under the Criminal Appeals Act are such that we must accept the Circuit Court's construction of the counts and consider only whether its decision that the acts charged are not condemned as criminal by the Anti-Trust Act is based upon an erroneous construction of that statute" (p. 535).

Authorities cited by Government.

The Government cites generally, with reference to the commerce clause and the commerce power of Congress, numerous decisions, historical incidents, text writers and other authorities (pp. 13-69).

In view of the total irrelevancy of the Government's discussion of these theoretical issues, there is no need to discuss specifically the authorities cited. Most of the authorities, it might be noted, are individuals who expressed views on fire insurance prior to this Court's sweeping opinion in the *Deer Lodge* case disposing of those views.

We merely wish to add that *none* of these authorities states that fire insurance is commerce within the meaning of the Sherman Act.

Conclusion

Fire insurance must, necessarily, be regulated.

This regulation, however, whether State or Federal, must take a cooperative rather than a competitive form. The experience of the States and the economics of the business teach us that this is imperative.

If the Federal Government is now to supersede the States in the regulation of fire insurance, as the Government would seem to desire, we submit that such revolutionary action should be taken by Congress. A legislative body alone can study the operations of the business, and adapt the legislative provisions accordingly. A judicial order blindly subjecting fire insurance to a rigid competitive standard would make bad law and worse economics—creating enormously greater problems and giving rise to far greater evils than any sought thereby to be solved.

The order of the District Court dismissing the indictment herein should be affirmed.

Respectfully submitted,

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Appendix A.

COMPARISON OF NET PREMIUMS WRITTEN[1]

	Fire Insurance	Inland Marine	Total	% of Inland Marine to total
Alabama	$ 56,743,353	$ 1,899,263	$ 58,642,616	3.2
Florida	70,271,342	3,434,635	73,705,977	4.7
Georgia	74,050,596	4,074,369	78,124,965	5.2
North Carolina	79,464,779	3,153,942	82,618,721	3.8
South Carolina	36,917,918	1,075,578	37,993,496	2.8
Virginia	72,701,154	3,275,236	75,976,390	4.3
TOTAL	$390,149,142	$16,913,023	$407,062,165	4.2

[1] "Net premiums written" are the total premiums on contracts issued less return and reinsurance premiums.

* * * * * *

SOURCE: The above statistics regarding the amount of Fire and Inland Marine Insurance net premiums were taken from the Weekly Underwriter's "Record of Fire Insurance by States for 1942" (1943). The totals and percentages were compiled by counsel.

Appendix B.

The following quotations from leading writers on insurance illustrate that informed opinion opposes competition in fire insurance as against the public interest.

Huebner's "Property Insurance" (3rd Ed. 1938) in referring to the evils of competition in insurance states:

> "* * * Open competition instead of being the 'life of business,' as was once so generally believed, has proved to be the source of numerous discriminatory practices and the financial instability of the companies. Cooperation through underwriters' associations, if properly conducted, leads to stability of rates, strengthens the companies financially by avoiding cut-throat competition, results in the adoption of higher standards of business conduct and a better

supervision of the business, and tends to eliminate unfair discrimination."

• • • • • •

"• • • Anti-compact legislation, however, is on the decline. The numerous advantages resulting from concerted action among companies are becoming too apparent to justify any longer a policy of forbidding cooperative effort" (pp. 347, 348 and 356).

Dean, "The Philosophy of Fire Insurance," Vol. I (1925), similarly views with disfavor open competition in fire insurance:

"• • • Open competition simply fixes the tax with reference to the financial standing or personal influence of the owner, without regard to the hazard of the property, and this means favoritism to the financially strong at the expense of the financially weak.

• • • • • •

"Rate reductions made through tariffs are made solely with regard to the fire hazard assumed. Rate reductions made in open competition are made solely through personal considerations" (pp. 32 and 35).

Magee, "Property Insurance" (1941) advances the cogent argument that stability in rate making is essential to public confidence.

"Since it is the function of insurance to indemnify the insured for loss, it is manifestly impossible that this will be accomplished unless sufficient funds for the purpose are collected. In the early days of insurance, unrestrained rate cutting was followed by the failure of scores of companies in periodic disasters. Not until the matter of rate making was

stabilized were insurance companies able to command the confidence of the public."

• • • • • •

"Rate making today is largely a function of organization set up and maintained by insurance companies, and the rates promulgated by them are observed by all companies participating. The first efforts to set up regional rate making organizations met with bitter opposition. • • • As the outgrowth of this opposition, various state legislatures undertook to prohibit cooperative rate making by the enactment of bills that came to be known as 'anti-compact laws.' However, it soon became apparent to those entrusted with the regulation of insurance companies that there devolved upon them an important duty that must be given precedence over the problem of securing rate reductions through the operation of unrestrained competition. Recognition of importance of safeguarding the solvency of companies was the first step in the direction of ending competitive rates and the establishment of cooperative rate making agencies" (pp. 119, 120, 121 and 122).

Mowbray "Insurance, its theory and practice in the United States" (2d Ed. 1937) concisely states that:

"• • • unregulated competition leads to rate wars which vitiate the financial foundation of the business, or to commission wars which are even more detrimental to the interest of policyholders and public. Whatever may be said for competition as a regulator in other economic fields, it works badly in the making of insurance rates."

• • • • • •

"• • • In the public interest such competition must be restricted within reasonable bounds, either by state compulsion or by voluntary action."

• • • • • •

> "The more recent tendency in state policy has been to recognize the need of cooperation in rate making, and to require by law membership in a rating organization for each territory in the state in which the company operates, making adherence to its rates and rules mandatory" (pp. 315, 444 and 446).

Zartman and Price, "Property Insurance" (1921), points out the desirability of cooperation among fire insurance companies:

> "What, then, is our conclusion regarding efforts at cooperation among the companies? It is that such cooperation is highly desirable from every point of view" (p. 246).

Moore, "Fire Insurance and How to Build" (1903), presents the following irrefutable argument in favor of State curtailment of fire insurance competition:

> "It should not require argument to demonstrate that, since all the companies having policies on a burned property must incur the same percentage of loss and also the same percentage of expense, they should get the same rate, and the property-owner may well be suspicious of a company offering to write at a lower rate than the majority of companies are willing to accept" (p. 33).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 354

UNITED STATES OF AMERICA

vs.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, et al

BRIEF OF COMMONWEALTH OF VIRGINIA AMICUS CURIAE

INTEREST OF THE COMMONWEALTH OF VIRGINIA

The ultimate question before the Court in this case is whether the Sherman Antitrust Act, as amended by Act of August 17, 1937, is to be construed as applicable to the insurance business. Virginia statutes have set up

a comprehensive system of regulating the various types of insurance covering risks in this State. The system is predicated upon the hypothesis that the Sherman Act does not apply to insurance. It is based upon the long recognized principle that insurance rates are to be regulated and not subject to the cross-fires of competition with its resulting discriminations in favor of large interests. In this system of rate regulation in order to determine and fix proper premium rates, the State has utilized the loss experiences compiled under certain specified conditions by the insurers, and this has necessitated joint action by the various underwriters. The Government claims such joint action would violate the Sherman Act if the act applies to insurance contracts. It is impossible to foretell the degree of confusion and uncertainty which would follow a requirement that the State systems of regulation should be remodeled to conform to the antitrust law. It is believed that a chaotic condition would follow, and that this would not be in the public interest. For this reason this *amicus curiae* brief is filed on behalf of the Commonwealth of Virginia. It will be restricted to the two following points:

I. Regardless of whether this Court might be of opinion that its recent decisions would justify a holding that insurance is commerce, the proper interpretation of the Sherman Act does not permit the inclusion of insurance contracts within its provisions.

II. The particular problem relating to the regulation of insurance companies which the

Department of Justice seeks to solve in this proceeding can be more effectively dealt with through co-operative action by the Federal and State Governments than by the drastic and perhaps destructive remedy here under consideration.

ARGUMENT

I.

Regardless of Whether this Court Might Be of Opinion That Its Recent Decisions Would Justify a Holding That Insurance is Commerce, the Proper Interpretation of the Sherman Act Does Not Include Insurance Within Its Provisions.

The statute, in defining the transactions embraced within its terms, confines same to acts in "restraint of trade or commerce among the several States, or with foreign nations". This is substantially the same language used in the Commerce Clause of the Constitution that Congress shall have power "to regulate commerce with foreign nations and among the several states". In employing this language Congress must be held to have intended it to mean what this Court, prior to the enactment of the statute, had held that said language meant. In *Kepner* v. *U. S.*, 195 U. S. 100, this Court said:

> "It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial

decision, is presumed to be used in that sense by the legislative body. *The Abbotsford,* 98 U. S. 440, 25 L. Ed. 168."

See also:

U. S. v. *Merriam,* 263 U. S. 179, 187.

25 Ruling Case Law, Statutes, sec. 236, p. 992.

Helvering v. *Griffiths* (1943), 63 Sup. Ct. Rep. 636.

Kirschbaum v. *Walling,* 316 U. S. 517.

At the time the Sherman Act was passed (July 2, 1890), this Court had clearly and unequivocally decided in four cases that insurance contracts were not embraced within the meaning of the phrase "commerce among the several States". In fact, it was held not to be "commerce" at all.

Paul v. *Virginia,* 8 Wall. 168 (1869)

Ducat v. *Chicago,* 10 Wall. 410 (1870)

Liverpool Ins. Co. v. *Oliver,* 10 Wall. 566 (1871).

Phila Fire Assn. v. *New York,* 119 U. S. 110 (1886).

This judicial definition of the word "commerce" as not including insurance, which was in full force and effect at the time of the passage of the Sherman Act, has been recognized and reaffirmed in numerous decisions of this Court since that time, as appears from the cases referred to in other briefs filed in this case. This Court has never departed from that definition.

Whatever may be the view of this Court at the present time as to the correctness of this judicial interpretation

of the language "commerce among the States", there is no doubt as to its legal meaning at the time the Sherman Act was passed in 1890 or amended in 1937. Therefore, there can be no doubt that at the time of the passage and of the amendment of said Act the business of insurance was not embraced within its provisions. It cannot be reasonably argued, therefore, that Congress intended the provisions of the Act to apply to insurance. It might well have been the case that, if there had been any doubt at the time of the enactment that insurance was excluded from its provisions, such business would have been expressly exempted therefrom. It is impossible for this Court to say what might have been the action of Congress in 1890 if "commerce among the several States" had been judicially defined as the Government now contends it should be. Therefore, the intention that the Act should apply to the insurance business cannot now be imputed to Congress. The question whether the definition of the term "commerce among the several States" might at this time be revised so as to include insurance is obviously not involved in this case, but is a moot question. The only question properly presented for decision here is what was the judicially defined meaning of the words used in the Act at the time it was passed.

II.

The Particular Problem Relating to the Regulation of Insurance Companies Which the Department of Justice Seeks to Solve in this Proceeding Can Be More Effectively Dealt With Through Co-operative Action by the Federal and State Governments Than By the Drastic and Perhaps Destructive Remedy Here Under Consideration.

In the summer of 1940 the Attorney General of the United States inaugurated a movement to promote co-operation between the Federal and State Governments to the end that their respective activities might be harmonized and united in attacking the many difficult problems arising out of the then existing emergency conditions and threats of war. At that time a conference was held in the Department of Justice Building attended by representatives of the Attorney General, the Governors' Council, the National Association of State Attorneys General, the Interstate Commission on Crime, and the Council of State Governments. Other similar conferences were held later which, in addition to the above, were attended by a great number of officials of the several States, and the general problems involved were discussed and considered at length. As a result of these conferences, a Drafting Committee was created, consisting mainly of representatives of State governments, the function of which was to draft model statutes for enactment by State Legislatures. This committee, acting under the auspices of the Council of State Governments and the Department of Justice, has considered many problems confronting the various departments of the Federal Government in connection

with emergency and war conditions. Representatives of the departments from time to time appeared before the committee, usually with a tentative draft of a proposed State statute designed to empower State governmental agencies to perform such functions as the several departments recommended in furtherance of the war effort. A great many model bills were approved at the numerous meetings of the Drafting Committee and these were transmitted by the Council of State Governments to the States for consideration by their legislatures. Most of them, with slight modifications to meet local conditions, the State legislatures have enacted.

That this movement to promote Federal-State co-operation has been successful, and that its results have proved of great benefit to the Navy, War, and other Departments, as well as to the States, was the view expressed by Attorney General Biddle at a recent meeting of the Drafting Committee. He also expressed at that time the hope that the functions of the committee and of the Department of Justice in connection therewith, might be so extended as to bring about like co-operation in other fields of government than those related to the war effort. It will be a magnificent achievement if this hope can be realized. Nothing could contribute more to the successful functioning and preservation of our dual system of government than such a continuation of these efforts at co-operation.

The problem of regulating the insurance business is an ideal one for such co-operative action. While the problem is, in the main, local in its nature, there are doubtless many phases of it in the solution of which

Federal regulatory assistance is desirable and would be welcomed by the States. If the Department of Justice has uncovered evils which it feels should be remedied, it is believed that such evils can most effectively be dealt with by co-operative action between the States and the Department of Justice. If additional State legislation or Congressional action is deemed desirable, a conference, at which the facts are disclosed, should result in agreement upon the action necessary to provide the needed remedy. But to drop a destructive bombshell at this time into the very heart of the State regulatory systems would be akin to burning down the house to kill the rats. Congress has not seen fit to undertake to set up a system of insurance regulation. The State systems are all we have. If the States were hindered in their efforts by applying the Sherman Act to them, and by a redefinition of interstate commerce so as to include the insurance business, this business would be left without any effective regulation.

While there is no doubt of the power of Congress to regulate the insurance business in so far as it affects interstate commerce, and nothing would be gained so far as such Congressional powers are concerned by a decision of this Court that the insurance business is interstate commerce, such a decision would have a most detrimental effect upon the regulatory powers of the State. Insurance is a much regulated business. The agents and their compensation are regulated. The companies are required to file reports, to deposit securities with State agencies, and to assist in compiling loss experience records. The States prescribe policy forms and rules for the interpretation of policies, securities

in which investments are permitted, and many other regulations. Although it is true that the States may regulate local affairs in interstate commerce in fields where there is no Federal regulation, they do not possess the same freedom to exercise this power in transactions which are themselves constituent parts of interstate commerce as in matters which merely affect such commerce.

Without meaning to assume an alarmist attitude, it does not require too vivid an imagination to visualize some of the injurious results which would flow from a decision that the insurance business is interstate commerce. Aside from the impact of the Sherman Act upon State regulation of premium rates, and doubt whether this would longer be permissible, nearly all other regulatory measures relating to insurance companies and their agents would be subject to challenge as an undue burden on or obstruction of interstate commerce. Injunctions suspending their operation would be sought and in many cases granted pending final decision in this Court.

What has been said above is not intended in any way as a disparagement of the actions of the antitrust division of the Department of Justice. It is but a common attribute of human nature for a public officer to view a problem presented to him as being within the proper function of his office to remedy, and the Division naturally turned to the Sherman Act as providing that remedy. Whether that view would have been taken if the matter had come to the office created to promote Federal-State Co-operation, however, may well be doubted.

CONCLUSION

It is respectfully submitted that this case is not one of sufficient urgency to call for a departure from the rule that judicially defined words used in a statute will be construed in conformity with such then existing definition; and that, so construed, no question is presented requiring the Court to reexamine the question whether the business of insurance is interstate commerce at this time.

Respectfully submitted,

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IN THE

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SOUTH-EASTERN UNDERWRITERS ASSOCIATION, ET AL
Appellees.

Brief on Behalf of the States of Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and West Virginia, as Amici Curiae.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 354

UNITED STATES OF AMERICA
Appellant.

vs.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, ET AL
Appellees.

Brief on Behalf of the States of Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and West Virginia, as Amici Curiae.

The Question Presented

The question presented is the correctness of the decision of the United States District Court for the

Northern District of Georgia sustaining the demurrers of the defendants and dismissing an indictment under the Sherman Anti-Trust Act on the ground that the business of fire insurance is not commerce as this Court has repeatedly held over a period of 75 years.

Fundamentally, however, the question involved is whether or not this Court will deny the right to the States to regulate and supervise the business of fire insurance as conducted within their borders, strike down the present nation-wide system of state regulation and supervision, and substitute centralized federal regulation and supervision in the place of state regulation and supervision. A reversal by this Court of its previous rulings that such business is not interstate commerce would bring the business under the commerce clause of the Constitution and the laws enacted pursuant thereto, including both the Sherman Act and the Federal Trade Commission Act and other acts as well, render invalid state laws regulating and supervising fire insurance and make necessary a drastic and unwarranted readjustment by the States of their policies with reference to the business of fire insurance.

The proper determination of this question is of such vital interest and importance to the several States and to their citizens, that it was determined to file this brief as *amici curiae* requesting that the decision of the lower court be affirmed.

Outline of the Argument

(1) This Court for a period of seventy-five years has repeatedly held that the business of fire insurance is not

commerce, either intra-state or interstate. This holding has been adhered to notwithstanding repeated attempts to obtain a contrary holding.

(2) Based on this holding, regulation of the business of fire insurance by the States has been upheld by this Court, so that there developed and now exists an adequate regulation of the business of fire insurance by the several States.

(3) To now rule that the business of fire insurance is interstate commerce would eliminate the legal basis for state regulation and supervision of such business and automatically bring the business, its regulation and supervision, under laws enacted pursuant to the commerce clause of the Constitution, which Congress did not intend and, in consequence, were not adopted for that purpose, and would produce chaos in the field, substituting this chaotic condition for the present effective method of state regulation and supervision.

(4) The object of state regulation is to provide solvent insurance at reasonable, fair and non-discriminatory rates based upon the measure of the hazard assumed. Unrestricted competition in the field of fire insurance will not be in the interests of the public, the States or the federal government.

(5) This situation presents a perfect case for application of the rule of *stare decisis*.

Argument

Important though this case may be from the standpoint of the defendants, it is even more important to

the States for it involves the question whether the States will be deprived of their sovereignty, whether their laws shall be repealed and the decisions of their courts held for naught, and whether a drastic change in their policy and an unwarranted readjustment shall be imposed upon them.

Both Counts of the indictment are predicated on the assumption that fire insurance is commerce; that the contract of insurance is a commodity in commerce and not a contractual relationship. Based upon this assumption, a conspiracy was charged to restrain interstate trade and commerce and to monopolize such trade and commerce in fire insurance.

A demurrer to the indictment upon the ground that the business of insurance is not commerce was sustained by the District Court and the indictment dismissed, the court stating "The Supreme Court has repeatedly held during a period of 75 years that the business of insurance is not commerce, either intrastate or interstate. They have done so unequivocally and unambigiously." (R. 18) "Counsel for the government conceded that in the numerous decisions the Supreme Court has held that the business of insurance is not commerce, yet strangely enough ask this Court to rule directly to the contrary. * * * If there is to be any overruling of the long line of clear-cut and thoroughly considered decisions of the Supreme Court, acquiesced in for 75 years by Congress and administrative agencies, it will have to be done by the Supreme Court or by Congress." (R. 20)

The District Court was asked to overrule the prior decisions of this Court. It properly declined to do so. Now this Court is asked to reverse those rulings.

If this Court should now reverse its prior decisions in which it held, beginning in 1868 down to 1940, that insurance is not commerce but is a local business subject to state regulation, obviously this would serve to bring insurance under the Sherman Act. But, an equally direct and even more revolutionary and catastrophic result would be the substitution of a completely different system of laws and constitutional restrictions upon the States. This was clearly pointed out by this Court in 1913 in the case of *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495, when it declined to overrule the case of *Paul v. Virginia*, 8 Wall. 168, decided in 1868, and the cases which had followed and reaffirmed that decision.* In that case the Court said:

> "If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of stare decisis. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of state legislation, and under varying circumstances the same principle was applied in all of them. For over forty-five years they have been the legal justification for such legislation. *To re-*

*Ducat v. Chicago, 10 Wall. 410
Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566
Phila. Fire Assn. v. New York, 119 U. S. 110
Hooper v. California, 155 U. S. 648
Noble v. Mitchell, 164 U. S. 367
N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389
Nutting v. Massachusetts, 183 U. S. 553

verse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision." (Italics supplied.)

While little could be added to the above statement of this Court, it might be well to point out that this Court, when it held in the case of *Paul v. Virginia* that the business of insurance was not commerce and therefore subject to state regulation free from any limitation under the commerce clause of the Constitution, as a collateral result, created a classification which was the basis of applying the test of the 14th Amendment to state laws regulating the business of insurance.

In other words, by treating the business of insurance as in a class separate and apart from that of concerns engaged in interstate commerce, it thereby destroyed any right to challenge a state statute because it applied to insurance companies and did not apply to concerns engaged in commerce.

Following the decision in *Paul v. Virginia*, upholding the right of a state to impose conditions under which the right to conduct a fire insurance business within a state would be granted and enforcing compliance therewith by the power to revoke such right, state laws were enacted prescribing the type of contract and the qualifications of agents; requiring the filing of annual statements and submission to investigation and inspection of company records; limiting the amount of liability assumed and the nature of investments; requiring adequate reserves; prohibiting discrimination between

risks of the same class and hazard, and imposing a distinctive method of taxation.

The thoroughness and scope to which state regulation has developed is well illustrated by the decisions of this Court where the following regulations were specifically upheld:

(a) Fixing insurance rates.
German Alliance Ins. Co. v. Lewis, 233 U. S. 389

(b) Regulating commissions.
O'Gorman and Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251

(c) Allowing attorney's fees against insurance companies in unsuccessful litigation or for bad faith in refusal to pay or unreasonable delay.

Fidelity Mutual Life Assn. v. Mettler, 185 U. S. 301

Iowa Life Ins. Co. v. Lewis, 187 U. S. 335

Farmers and Merchants Ins. Co. v. Dobney, 189 U. S. 301

(d) Providing for the execution of insurance contracts by resident agents and the payment of commissions thereto.

Osborn et al v. Ozlin et al, 310 U. S. 53

(e) Providing for the regulation of a reciprocal fire insurance association even though its contracts are entered into outside of the state, if they relate to property within its borders.

Hoopeston Canning Co. et al v. Cullen, 318 U. S. 313.

The object of state regulation is to provide solvent insurance at reasonable, fair and non-discriminatory rates, based upon the measure of the hazard assumed. This result is achieved not only by laws regulating the business of insurance and withdrawing the business of fire insurance from the field of free and unrestricted competition but by supplementary or complementary laws that operate directly upon the general public and result in reducing the fire wastage, with a consequent reduction in the premium rate. Such laws not only embrace state statutes administered by the insurance departments, but municipal ordinances as well, such as those providing for fire marshals, firemen's pensions and building codes, some of which are maintained by a direct tax upon the fire insurance companies. If the base is removed upon which state regulation is upheld, then these laws would fall.

Manifestly substituting the Sherman Act and the commerce clause of the Constitution for state regulation and bringing the business of insurance into the field of free and unrestricted competition would be a poor substitute for the effective system of state regulation which is based upon the right to deny to an insurance company the privilege of continuing in business within a state except upon the terms and conditions prescribed by state law.

Such right on the part of the States to deny or revoke the license of an offending company is most effective because it can be enforced without loss or inconvenience to the general public. This is due to the fact that the business of fire insurance is conducted through independent or third party local agents. If one company is

prohibited from continuing in business because of the violation of regulatory laws or orders, others already in the field can and do immediately fill the gap without loss or damage to the public or the independent third party agent, the entire loss falling upon the offending company. The independent or third party local agency is itself the product of state regulation and any judgment which would destroy that development would result in serious economic loss to such agents and to the State.

To now hold that the business of fire insurance is commerce would bring the business within the scope of other laws passed pursuant to the commerce clause of the Constitution and automatically place the regulation of the insurance business under the Federal Trade Commission,

> *Federal Trade Commission Act*, 15 U. S. C. §§ 45 and 46

to the considerable extent that the Act applies to interstate commerce.

> *Federal Trade Comm. v. Bunte Bros., Inc.*, 312 U. S. 349.

This would certainly substitute a system of regulation and supervision not intended by Congress for that purpose, for an adequate system of regulation and supervision which not only was designed for that purpose but has the background of the coordinated experience for 75 years of the States and their insurance departments in the regulation and supervision of such business.

To now hold that the business of fire insurance is commerce will result inevitably in federal regulation destroying the sovereignty of the States in this field and reducing the States to the status of complainants before a federal bureau.

The fire insurance business in our respective States is being fairly and equitably conducted by the companies; our laws regulating this business are adequate and these laws are being enforced by competently staffed insurance departments.* Our insurance departments are conducted to our satisfaction. Our laws are in the main satisfactory to us. We want to retain these laws and the right to make such amendments as conditions might require.

CONCLUSION

State regulation and supervision of insurance has developed on the basis of the holdings of this Court for the past 75 years that insurance is not commerce, but is a local business subject to state regulation.

The business of insurance has developed and been conducted on the same basis.

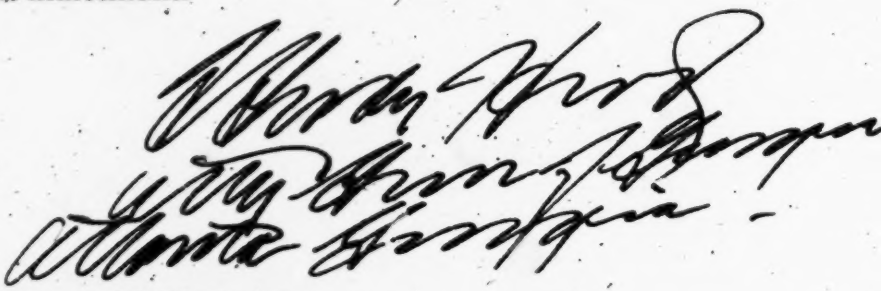
Congress itself, in enacting laws under the commerce clause, has done so on the basis that the business of insurance was not affected.

A reversal would require the States, the insurance companies, Congress, the courts and the public to start all over again in approaching the regulation, super-

*See Appendices A and B.

vision and conduct of the insurance business. If ever there was a set of facts which called for the application of the rule of *stare decisis*, such facts are now presented.

We ask the Court to reaffirm its prior decisions and to affirm the judgment of the lower court dismissing the indictment.



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APPENDIX A

It is interesting to compare a state statute providing for a rating bureau to promulgate reasonable and non-discriminatory premium rates with the Sherman Act.

We quote the West Virginia Act, along-side the Sherman Act. It is obvious when the two are read together that they are mutually inconsistent.

West Virginia Statute

"Every fire insurance company or other insurer authorized to effect insurance against the risk of loss or damage by fire in this State shall maintain or be a member of a rating bureau."

"In the event that any rating bureau should desire to make a change in its established schedules, rules, regulations, contracts or agreements, it shall submit such proposed change in writing to the insurance commissioner and the commissioner shall thereupon order a hearing not earlier than twenty days thereafter, which hearing may be attended by any persons whose interests may be affected by such proposed change. At the conclusion of such hearing the commissioner shall enter an order showing his finding in the premises . . . The Commissioner may compel obedience to his lawful orders . . ."

"Any deviation of any company or insurer from the schedule of rates established and maintained by the bureau which it maintains or of which it is a member, shall be uniform in its application to all of the risks in the class for which the variation is made, and no such uniform deviation shall be made unless notice thereof shall be filed with the bureau of which the insurer is a member and the insurance commissioner, . . ."

Code of W. Va. 1931, as amended, Ch. 33, Art. 4, Secs. 11, 14 and 18.

Sherman Anti-Trust Act

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:"

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

U.S.C.A., Title 15, Secs. 1 and 2.

APPENDIX B

The South-Eastern Underwriters Association was organized in the State of Georgia in 1882, for the purpose of determining fair and equitable rates for fire insurance based upon the measure of the hazard assumed. It and its Member Companies have operated continuously in accordance with our laws, one of which was adopted in 1891—Section 56-219 et seq., Ga. Code Ann., which is quoted herewith. A comparison of this law with the Sherman Act is invited:

"56-219. (2466) *Arrangements by companies or agents preventing or lessening competition; revocation of license to do business.*—No insurance company authorized to do business in this State, or the agent thereof, shall make, maintain, or enter into any contract, agreement, pool, or other arrangement with any other insurance company or companies, licensed to do business in this State, or the agent or agents thereof, for the purpose of, or that may have the tendency or effect of, preventing or lessening competition in the business of insurance transacted in this State. When it shall be made to appear to the Commissioner of Insurance that any company or agent has entered into any such contract, agreement, pool, or other arrangement, said Commissioner shall revoke the license issued to such company and the same shall not be reissued until the president or chief officer of such company shall file an affidavit with said Commissioner, stating that such contracts, agreements, pools, or other arrangements have been annulled and made void: Provided, that nothing in this Chapter shall be so construed as to prevent any insurance company, legally authorized to transact business in this State, from separately surveying, inspecting, or examining the premises to be insured, by and with the consent of the owner, for the purpose of bringing about improvements in fire protection, so as

to lessen the cost of insurance by reducing rates. (Acts 1890-1, p. 206)

"56-220. (2467) *Same; complaints by citizens; citation.*—Any citizen of this State whose rates of insurance have been increased, or who has been refused insurance at reasonable rates, may file a written complaint under oath, to the best of his knowledge and belief, with the Insurance Commissioner, charging any company or companies authorized to do business in this State with a violation of the preceding section, and thereupon it shall be the duty of said Insurance Commissioner to issue a citation, addressed to the company or companies against whom said complaint shall be made, requiring it or them to be and appear before said Insurance Commissioner at a time and place to be fixed by said Insurance Commissioner, not less than 20 nor more than 40 days from the date of the filing of the complaint, and show cause why their license should not be revoked as provided by the preceding section. Said citation shall be served not less than 10 days from the date of filing said complaint by the sheriffs or constables of the State in the same manner as provided by law for the service of process upon insurance companies. (Acts 1890-1, p. 206)

"56-221. (2468) *Same; practice as to testimony, etc., on hearing of complaints.*—For the purposes of the provisions of this Chapter, the Insurance Commissioner may administer oaths, issue subpoenas for witnesses, hear testimony, and issue commissions for taking testimony by interrogatories; and the party or parties complaining, and the company or companies defending, may serve notice for the production of books and papers, under the rules provided by law for civil actions in the superior courts. (Acts 1890-1, p. 206)

"56-222. (2469) *Same; place of hearing of complaints; costs and fees; execution.*—The Insurance

Commissioner shall fix the place of hearing or trial. The costs and fees for the sheriff or constable, witnesses, and the commissioners taking interrogatories shall be the same as now provided by law for similar service in the superior courts, the same to be taxed against and paid by the party or parties cast in said suit; and against whom said Insurance Commissioner shall find; for which costs said Insurance Commissioner is hereby authorized to issue execution to be levied and collected as executions from the courts. (Acts 1890-1, p. 206)"

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SUPREME COURT OF THE UNITED STATES.

No. 354.—October Term, 1943.

The United States of America, Appellant, *vs.* South-Eastern Underwriters Association, et al.	On Appeal from the District Court of the United States for the Northern District of Georgia.

[June 5, 1944.]

Mr. Justice Black delivered the opinion of the Court.

For seventy-five years this Court has held, whenever the question has been presented, that the Commerce Clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories. Each state has been held to have this power even though negotiation and execution of the companies' policy contracts involved communications of information and movements of persons, moneys, and papers across state lines. Not one of all these cases, however, has involved an Act of Congress which required the Court to decide the issue of whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines. Today for the first time in the history of the Court that issue is squarely presented and must be decided.

Appellees—the South-Eastern Underwriters Association (S. E. U. A.), and its membership of nearly 200 private stock fire insurance companies, and 27 individuals—were indicted in the District Court for alleged violations of the Sherman Anti-Trust Act. The indictment alleges two conspiracies. The first, in violation of § 1 of the Act, was to restrain interstate trade and commerce by fixing and maintaining arbitrary and non-competitive premium rates on fire and specified "allied lines"[1] of insurance in Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia;

[1] The "allied lines" of insurance handled by appellees are described in the indictment as "inland navigation and transportation, inland marine, sprinkler leakage, explosion, windstorm and tornado, extended coverage, use and occupancy, and riot and civil commotion insurance."

the second, in violation of § 2, was to monopolize trade and commerce in the same lines of insurance in and among the same states.[2]

The indictment makes the following charges: The member companies of S. E. U. A. controlled 90 per cent of the fire insurance and "allied lines" sold by stock fire insurance companies in the six states where the conspiracies were consummated.[3] Both conspiracies consisted of a continuing agreement and concert of action effectuated through S. E. U. A. The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S. E. U. A. members on S. E. U. A. terms. Companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-S. E. U. A. companies were punished by a withdrawal of the right to represent the members of S. E. U. A.; and persons needing insurance who purchased from non-S. E. U. A. companies were threatened with boycotts and withdrawal of all patronage. The two conspiracies were effectively policed by inspection and rating bureaus in five of the six states, together with local boards of insurance agents in certain cities of all six states.

The kind of interference with the free play of competitive forces with which the appellees are charged is exactly the type of conduct which the Sherman Act has outlawed for American "trade

[2] The pertinent provisions of Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2, commonly known as the Sherman Act, are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor. . . .

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, ..."

[3] The indictment does not state the proportion of fire insurance and "allied lines" sold by stock companies, as distinguished from mutuals, etc., in the six states involved. But it does state that "stock companies receive approximately 85% of the total premium income of all fire insurance companies operating in the United States."

or commerce" among the states.[4] Appellees[5] have not argued otherwise. Their defense, set forth in a demurrer, has been that they are not required to conform to the standards of business conduct established by the Sherman Act because "the business of fire insurance is not commerce." Sustaining the demurrer, the District Court held that "the business of insurance is not commerce, either intrastate or interstate;" it "is not interstate commerce or interstate trade, though it might be considered a trade subject to local laws, either State or Federal, where the commerce clause is not the authority relied upon." 51 F. Supp. 712, 713, 714.

The District Court's opinion does not contain the slightest intimation that the indictment was held defective on a theory that it charged the appellees with restraining and monopolizing nothing but the making of local contracts. There was not even a demurrer on that ground. The District Court treated the indictment as charging illegal restraints of trade in the total "activities complained of as constituting the business of insurance." 51 F. Supp. 712, 713. And in great detail the indictment set out these total activities, of which the actual making of contracts was but a part. As recognized by the District Court, the insurance business described in the indictment included not only the execution of insurance contracts but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to performance of the contracts. All of these alleged transactions, we shall hereafter point out, constituted a single continuous chain of events, many of which were multistate in character, and none of which, if we accept the allegations of the indictment, could possibly have been continued but for that part of them which moved back and forth across state lines. True, many of the activities described in the indictment which constituted this chain of events might, if conceptually separated from that from which they are inseparable, be regarded as wholly local. But

[4] See, e. g., Fashion Guild v. Trade Comm'n, 312 U. S. 457, 465-468; United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 210-224; Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 394; United States v. Trenton Potteries Co., 273 U. S. 392, 395-402; United States v. Patten, 226 U. S. 525; Swift and Company v United States, 196 U. S. 375.

[5] The appellees include all of the individuals and companies named as defendants in the indictment except the Universal Insurance Company and the Kansas City Fire and Marine Insurance Company, neither of which joined in the demurrer to the indictment.

the District Court in construing the indictment did not attempt such a metaphysical separation. Looking at all the transactions charged, it felt compelled by previous decisions of this Court to hold that despite the interstate character of many of them "the business of insurance is not commerce", and that as a consequence this "business", contracts and all, could not be "interstate commerce" or "interstate trade." In other words, the District Court held the indictment bad for the sole reason that the entire "business of insurance" (not merely the part of the business in which contracts are physically executed) can never under any possible circumstances be "commerce", and that therefore, even though an insurance company conducts a substantial part of its business transactions across state lines, it is not engaged in "commerce among the States" within the meaning of either the Commerce Clause or the Sherman Anti-Trust Act.[6] Therefore to say that the indictment charges nothing more than restraint and monopoly in the "mere formation of an insurance contract", as has been suggested in this Court, is to give it a different and narrower meaning than did the District Court,—something we cannot do consistently with the Criminal Appeals Act which permits the case to come here on direct appeal.[7]

The record, then, presents two questions and no others: (1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which restrains or monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which

[6] Although the District Court also sustained two additional grounds of demurrer (that the indictment did not state facts sufficient to constitute a federal offense, and that the court lacked jurisdiction of the subject matter), the opinion makes clear it did so because of the conclusion that "the business of insurance is not commerce." Two further grounds of demurrer, based upon the Fifth, Sixth, and Tenth Amendments, were not considered by the District Court.

[7] See 56 Stat. 271 amending 34 Stat. 1246; 18 U. S. C. 682; United States *v.* Borden Company, 309 U. S. 188, 192-193. Appellees contend that the District Court read both counts of the indictment as alleging that the trade or commerce sought to be restrained and monopolized was the business of selling fire insurance, that the Court rightly decided that such business was not commerce, and that therefore its judgment should be affirmed. The Government denies that the Court construed the indictment so narrowly. It insists that the first count of the indictment charges a violation of § 1 of the Act regardless of whether the insurance business itself be commerce, since the indictment charges that the practices of the fire insurance companies constituted an unlawful restraint of interstate trade or commerce in such fields as transportation and industry which must purchase fire insurance. Cf. Polish Alliance *v.* National Labor Relations Board, No. 226, this day decided. In the view we take of the case it is unnecessary to pass upon this question. We consider the case on the assumption that appellees' contention on this point is correct.

stretch across state lines constitute "Commerce among the several States" so as to make them subject to regulation by Congress under the Commerce Clause? Since it is our conclusion that the Sherman Act was intended to apply to the fire insurance business we shall, for convenience of discussion, first consider the latter question.

I.

Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. To hold that the word "commerce" as used in the Commerce Clause does not include a business such as insurance would do just that. Whatever other meanings "commerce" may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: businesses in which persons bought and sold, bargained and contracted.[8] And this meaning has persisted to modern times. Surely, therefore, a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate "Commerce among the several States" does not include the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines.[9]

The modern insurance business holds a commanding position in the trade and commerce of our nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most important branches of commerce.[10] Its total assets exceed $37,-

[8] See Gibbons *v.* Ogden, 9 Wheat 1; also, Hamilton and Adair, The Power to Govern (N. Y. 1937), pp. 53-63.

[9] Alexander Hamilton, in 1791, stating his opinion on the constitutionality of the Bank of the United States, declared that it would "admit of little if any question" that the federal power to regulate foreign commerce included "the regulation of policies of insurance." 3 Works of Alexander Hamilton (Fed. Ed., N. Y. 1904) pp. 445, 469-470. Speaking of the need of a federal power to regulate "commerce", Hamilton had earlier said, "It is, indeed, evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence." Federalist No. XXII, The Federalist (Rev. Ed., N. Y. 1901) 110.

[10] According to figures gathered by the National Resources Committee, each of the three largest legal reserve life insurance companies in 1935 had assets greater than any one of the three largest industrial corporations, viz., the Standard Oil Company of New Jersey, the United States Steel Corporation, or the General Motors Corporation. Report to the President by the National Resources Committee, June 9, 1939: The Structure of the American Economy, Part I., pp. 100, 101 (U. S. Government Printing Office).

000,000,000, or the approximate equivalent of the value of all farm lands and buildings in the United States.[11] Its annual premium receipts exceed $6,000,000,000, more than the average annual revenue receipts of the United States Government during the last decade.[12] Included in the labor force of insurance are 524,000 experienced workers, almost as many as seek their livings in coal mining or automobile manufacturing.[13] Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.[14]

This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East.[15] Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the

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[11] U. S. Department of Commerce, Statistical Abstract of the United States, 1942, pp. 335-342, 694.

[12] *Ibid.*, pp. 195, 335-342.

[13] Sixteenth Census of the United States—1940; Part 1: United States Summary, Vol. III, The Labor Force, pp. 180, 181.

[14] "We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. * * * Insurance . . . is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern." German Alliance Insurance Company v. Kansas, 233 U. S. 389, 414-415.

[15] The five largest legal reserve life insurance companies, owning total assets of approximately $15,000,000,000, have their home offices in or near New York City. Best's Life Reports, 1939, as summarized in Monograph 28 printed for the use of the Temporary National Economic Committee, Appendix A (U. S. Government Printing Office 1940). Each of these companies is licensed in every state of the Union except that two of them are not licensed in Texas. Life Insurance Year Book, 1942-3.

The five largest stock fire and marine insurance companies, owning total assets of approximately $550,000,000, are similarly located. Best's 1943 Digest of Insurance Stocks, xxxii. And each does business in every state of the union. *Ibid.*

many states where the policy holders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policy holders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state.

That the fire insurance transactions alleged to have been restrained and monopolized by appellees fit the above described pattern of the national insurance trade is shown by the indictment before us. Of the nearly 200 combining companies, chartered in various states and foreign countries, only 18 maintained their home offices in one of the six states in which the S. E. U. A. operated; and 127 had headquarters in either New York, Pennsylvania, or Connecticut. During the period 1931-1941 a total of $488,000,000 in premiums was collected by local agents in the six states, most of which was transmitted to home offices in other states; while during the same period $215,000,000 in losses was paid by checks or drafts sent from the home offices to the companies' local agents for delivery to the policy holders.[16] Local agents solicited prospects, utilized policy forms sent from home offices, and made regular reports to their companies by mail, telephone or telegraph. Special travelling agents supervised local operations. The insurance sold by members of S. E. U. A. covered not only all kinds of fixed local properties, but also such properties as steamboats, tugs, ferries, shipyards, warehouses, terminals, trucks, busses, railroad equipment and rolling stock, and movable goods of all types carried in interstate and foreign commerce by every media of transportation.

[16] The amounts given as premiums collected and losses paid during the period 1931-1941 are for all stock fire insurance companies operating in the six states involved. The companies which were parties to the alleged conspiracies probably collected and paid about 90% of these amounts since they controlled that percentage of the total business.

Despite all of this, despite the fact that most persons, speaking from common knowledge, would instantly say that of course such a business is engaged in trade and commerce, the District Court felt compelled by decisions of this Court to conclude that the insurance business can never be trade or commerce within the meaning of the Commerce Clause. We must therefore consider these decisions.

In 1869 this Court held, in sustaining a statute of Virginia which regulated foreign insurance companies, that the statute did not offend the Commerce Clause because "issuing a policy of insurance is not a transaction of commerce." *Paul* v. *Virginia*, 8 Wall. 168, 183.[17] Since then, in similar cases, this statement has been repeated, and has been broadened. In *Hooper* v. *California*, 155 U. S. 648, 654, 655, decided in 1895, the *Paul* statement was reaffirmed, and the Court added that, "The business of insurance is not commerce." In 1913 the New York Life Insurance Company, protesting against a Montana tax, challenged these broad statements, strongly urging that its business, at least, was so conducted as to be engaged in interstate commerce. But the Court again approved the *Paul* statement and held against the company, saying that "contracts of insurance are not commerce at all, neither state nor interstate." *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, 503-504, 510.[18]

In all cases in which the Court has relied upon the proposition that "the business of insurance is not commerce", its attention was focused on the validity of state statutes—the extent to which the

[17] "The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect —are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law." 8 Wall. 168, 183.

[18] Other cases which have repeated or relied upon the *Paul* generalization are Ducat *v.* Chicago, 10 Wall. 410, 415; Liverpool Insurance Company *v.* Massachusetts, 10 Wall. 566, 573; Philadelphia Fire Association *v.* New York, 119 U. S. 110, 118; Noble *v.* Mitchell, 164 U. S. 367, 370; New York Life Insurance Company *v.* Cravens, 178 U. S. 389, 401; Nutting *v.* Massachusetts,

Commerce Clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint. As early as 1866 the insurance trade, though still in its infancy,[19] was subject to widespread abuses.[20] To meet the imperative need for correction of these abuses the various state legislatures, including that of Virginia, passed regulatory legislation.[21] *Paul* v. *Virginia* upheld one of Virginia's statutes. To uphold insurance laws of other states, including tax laws, *Paul* v. *Virginia's* generalization and reasoning have been consistently adhered to.

Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause.[22] Furthermore, the reasons given in support of the generalization that "the business of insurance is not commerce" and can never be conducted so as to constitute "Commerce among the States" are inconsistent with many de-

183 U. S. 553; Northwestern Mutual Life Insurance Company *v.* Wisconsin, 247 U. S. 132; National Union Fire Insurance Co. *v.* Wanberg, 260 U. S. 71, 75; Bothwell *v.* Buckbee, Mears Company, 275 U. S. 274, 276-277; and Colgate *v.* Harvey, 296 U. S. 404, 432. For a collection and analysis of the cases see Gavit, The Commerce Clause of the United States Constitution (Bloomington, Indiana 1932), pp. 134-139.

19 For statistics illustrative of the tremendous expansion of the fire and marine insurance business between 1860-1941, see New York Insurance Report for 1942, Vol. II, Table A. In 1860 fire and marine insurance companies reporting to the New York Superintendent of Insurance listed assets of $44,500,000 and premiums written of $13,500,000. In 1941 they listed assets of almost $3,000,000,000, and premiums written of $1,150,000,000. *Ibid.*

20 See generally Insurance Blue Book (Centennial Issue 1876-77), c. VI, "Fire Insurance, 1860-1869"; Patterson, The Insurance Commissioner in the United States (Camb. 1927), pp. 519-537: Nehemkis, Paul *v.* Virginia, The Need for Re-examination, 27 Georgetown L. J. 519 (1939).

21 *Ibid.*

22 See, e. g., Wickard *v.* Filburn, 317 U. S. 111, 121-122; Binderup *v.* Pathe Exchange, 263 U. S. 291, 311; Stafford *v.* Wallace, 258 U. S. 495, 525-528; Bacon *v.* Illinois, 227 U. S. 504, 516-517; Swift and Company *v.* United States, 196 U. S. 375, 400.

cisions of this Court which have upheld federal statutes regulating interstate commerce under the Commerce Clause.[23]

One reason advanced for the rule in the *Paul* case has been that insurance policies "are not commodities to be shipped or forwarded from one State to another."[24] But both before and since *Paul* v. *Virginia* this Court has held that Congress can regulate traffic though it consist of intangibles.[25] Another reason much stressed has been that insurance policies are mere personal contracts subject to the laws of the state where executed. But this reason rests upon a distinction between what has been called "local" and what "interstate", a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. Cf. *Wickard* v. *Filburn*, 317 U. S. 111, 119-120; *Parker* v. *Brown*, 317 U. S. 341, 360. We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce. Cf. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 557-558. But it does not

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[23] That the decisions of this Court upholding state insurance laws do not necessarily constitute a denial of federal power to regulate insurance has, upon occasion, been recognized both by insurance executives and lawyers. See, for example, An Address on the Regulation of Insurance By Congress, by John F. Dryden, President, Prudential Insurance Company of America, delivered November 22, 1904, pp. 12-13: "The decision [Paul v. Virginia], and those that have followed, did not relate to the real point involved in a consideration of the regulation of *the insurance business* as interstate commerce by the Federal government. . . . It is the opinion of qualified authorities who have given most careful consideration to this aspect of the subject . . . that under the implied and resulting powers of the Constitution the Supreme Court would not withhold the verdict of constitutionality from an act of Congress declaring interstate insurance to be interstate commerce." See, similarly, Insurance is Commerce, by George F. Seward, President, The Fidelity and Casualty Company of New York (1910) pp. 15-16; S. S. Huebner, Federal Supervision and Regulation of Insurance. Annals, Amer. Acad. of Pol. and Soc. Science, Vol. xxvi, No. 3 (1905) 681-707. But see, e. g., *contra*: Vance, Federal Control of Insurance Corporations. 17 Green Bag (1905) 83, 89; Randolph, Opinion on the Proposal for Federal Supervision of Insurance (N. Y. 1905) pp. 12-20.

The report of the Committee on Insurance Law of the American Bar Association, in 1906, discussing the constitutionality of federal supervision of insurance, stated flatly that Paul v. Virginia and the cases which follow it "do not bar Congressional action." Reports of American Bar Association, Vol. xxix, Part 1 (1906), pp. 538, 552-567.

[24] See Note 17, *supra*.

[25] See for illustration Gibbons v. Ogden, 9 Wheat. 1, 189-190, 229-230; Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S. 1; Lottery Case, 188 U. S. 321; Jordan v. Tashiro, 278 U. S. 123, 127-128; Electric Bond & Share Co. v. Securities & Exchange Comm'n, 303 U. S. 419, 432-433; and American Medical Association v. United States, 317 U. S. 519.

follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce.[26] Only by treating the Congressional power over commerce among the states as a "technical legal conception" rather than as a "practical one, drawn from the course of business" could such a conclusion be reached. *Swift and Company* v. *United States*, 196 U. S. 375, 398. In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce.[27]

Another reason advanced to support the result of the cases which follow *Paul* v. *Virginia* has been that, if any aspects of the business of insurance be treated as interstate commerce, "then all control over it is taken from the States and the legislative regulations which this Court has heretofore sustained must be declared invalid".[28] Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation.[29] And there is a wide

[26] Cf. Hoopeston Canning Co. v. Cullen, 318 U. S. 313, 317. "The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility." German Alliance Insurance Company v. Kansas, 233 U. S. 389, 414. And see Furst v. Brewster, 282 U. S. 493, 497-498.

[27] Appraising the *Swift* case, Mr. Chief Justice Taft had this to say: "That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. *It refused to permit local incidents of a great interstate movement, which taken alone were intrastate, to characterize the movement as such.* (Italics supplied.) The *Swift Case* merely fitted the commerce clause to the real and practical essence of modern business growth." Chicago Board of Trade v. Olsen, 262 U. S. 1, 35.

Compare Indiana Farmers' Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U. S. 268, 274-277; Stafford v. Wallace, 258 U. S. 495, 518-519.

[28] New York Life Insurance Company v. Deer Lodge County, 231 U. S. 495, 509.

[29] See, e. g., Crutcher v. Kentucky, 141 U. S. 47, 59-61; Atlantic Refining Co. v. Virginia, 302 U. S. 22, 26; McGoldrick v. Berwind-White Co., 309 U. S. 33.

range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states.[30] In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated.[31] And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid.[32]

The real answer to the question before us is to be found in the Commerce Clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. *Lottery Case*, 188 U. S. 321, 355. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, *Hoke* v. *United States*, 227 U. S. 308, 320-323; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, *United States* v. *Simpson*, 252 U. S. 465; to drive a stolen automobile from Iowa to South Dakota,

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[30] See Gibbons v. Ogden, 9 Wheat. 1, 200, 203-210; Willson v. Black Bird Creek Marsh Co., 2 Pet. 245, 250-252; License Cases, 5 How. 504, Opinion of Mr. Chief Justice Taney, 578-586; Cooley v. Board of Wardens, 12 How. 299, 318-321; Kelly v. Washington, 302 U. S. 1, 9-10. Cf. Sturges v. Crowninshield, 4 Wheat. 122, 192-196; Houston v. Moore, 5 Wheat. 1, Opinion of Mr. Justice Story, 48-50.

[31] Parker & Brown, 317 U. S. 341, 362-363; cf. California v. Thompson, 313 U. S. 109, 112-116; South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U. S. 177, 184-192, and cases cited therein in footnote 5; Hall v. Geiger-Jones Company, 242 U. S. 539, 558-559; Bowman v. Chicago and Northwestern Railway Company, 125 U. S. 465, 482-483. That different members of the Court applying this test to a particular state statute may reach opposite conclusions as to its validity does not argue against the correctness of the test itself. Such differences in judgment are inevitable where solution of a Constitutional problem must depend upon considered evaluation of competing Constitutional objectives. See, e. g., McGoldrick v. Berwind-White Co., 309 U. S. 33, 48, 59; McCarroll v. Dixie Greyhound Lines, Inc., 309 U. S. 176, 183; Duckworth v. Arkansas, 314 U. S. 390, 397; cf. Gwin, etc., Inc. v. Henneford, 305 U. S. 434, 442.

[32] See, e. g., Cooley v. Board of Wardens, 12 How. 299; New York Life Insurance Company v. Deer Lodge County, 231 U. S. 495; cf. Bowman v. Chicago and Northwestern Railway Company, 125 U. S. 465, 482-483.

Brooks v. *United States*, 267 U. S. 432, 436-439. Diseased cattle ranging between Georgia and Florida are in commerce, *Thornton* v. *United States*, 271 U. S. 414, 425; and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount federal regulation, *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 11. Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation;—activities which, as part of the conduct of a legitimate and useful commercial enterprise, may embrace integrated operations in many states and involve the transmission of great quantities of money, documents, and communications across dozens of state lines.

The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition.[33] The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189-190: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . ." Commerce is interstate, he said, when it "concerns more States than one." *Id.*, 194. No decision of this Court has ever questioned this as too compre-

[33] Lottery Case, 188 U. S. 321, 363; cf. Kirschbaum v. Walling, 316 U. S. 517, 520. This particular difficulty was recognized by the authors of the Federalist Papers: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications . . . . Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The Convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all." Federalist No. XXXVI, The Federalist (Rev. Ed., N. Y. 1901), pp. 193-194.

hensive a description of the subject matter of the Commerce Clause.[34] To accept a description less comprehensive, the Court has recognized, would deprive the Congress of that full power necessary to enable it to discharge its Constitutional duty to govern commerce among the states.[35]

The power confided to Congress by the Commerce Clause is declared in The Federalist to be for the purpose of securing the "maintenance of harmony and proper intercourse among the States."[36] But its purpose is not confined to empowering Congress with the negative authority to legislate against state regulations of commerce deemed inimical to the national interest. The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.[37] This federal

[34] "Commerce is intercourse: one of its most ordinary ingredients is traffic." Brown *v.* Maryland, 12 Wheat. 419, 446. "And although commerce includes traffic in this narrower sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse." Jordan *v.* Tashiro, 278 U. S. 123, 127-128. Commerce "comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities. . . ." Welton *v.* Missouri, 91 U. S. 275, 280. And "intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution, especially where . . . . such intercourse and communication really relates to matters of regular, continuous business and to the making of contracts and the transportation of books, papers, etc., appertaining to such business." International Textbook Company *v.* Pigg, 217 U. S. 91, 107.

[35] See Pensacola Telegraph Company *v.* Western Union Telegraph Company, 96 U. S. 1, 9.

"A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control, but a regard to the public good and to the sense of the people." Federalist No. XXX, The Federalist, *supra*, 154.

[36] Federalist No. XL; Federalist No. XLI; The Federalist, *supra*, pp. 220, 231.

[37] Compare Federalist No. XXIII, The Federalist, *supra*, 121: "Shall the Union be constituted the guardian of the common safety? Are fleets and armies, and revenues, necessary to this purpose? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend. . . . Not to confer in each case a degree of power commensurate to the end, would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success."

See Note (1943), 32 Georgetown Law Journal 66.

power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is equally essential to the welfare of that Nation.[38]

Our basic responsibility in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it. That power, as held by this Court from the beginning, is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary. No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.

II.

We come then to the contention, earnestly pressed upon us by appellees, that Congress did not intend in the Sherman Act to exercise its power over the interstate insurance trade.

Certainly the Act's language affords no basis for this contention. Declared illegal in § 1 is "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ."; and "every person" who shall make such a contract or engage in such a combination or conspiracy is deemed guilty of a misdemeanor. Section 2 is not less sweeping. "Every person" who monopolizes, or attempts to monopolize, or conspires with "any other person" to monopolize, "any part of the trade or commerce among the several States" is, likewise, deemed guilty of a misdemeanor. Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.

A general application of the Act to all combinations of business and capital organized to suppress commercial competition

[38] The powers conferred by the Commerce Clause "are not confined to the instrumentalities of commerce . . . known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. . . . They were intended for the government of the business to which they relate, at all times and under all circumstances." Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S. 1, 9. Compare Federalist No. XLIII, The Federalist, *supra*, 248.

is in harmony with the spirit and impulses of the times which gave it birth. "Trusts" and "monopolies" were the terror of the period.[39] Their power to fix prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but some of numerous evils ascribed to them.[40] The organized opponents of trusts aimed at the complete destruction of all business combinations which possessed potential power, or had the intent, to destroy competition in whatever the people needed or wanted.[41] So great was the strength of the anti-trust forces that the issue of trusts and monopolies became non-partisan. The question was not whether they should

[39] A historian of the Wheel, one of the strongest of the farmers' organizations in the '80's, had this to say about its origin: "The question has often been asked, what gave rise to the Wheel? This question is as easily answered as asked, *Monopoly!* . . . Monopoly aspires to make the people its servants, politically, financially and socially, and demands that we offer on its golden altar all that we are and have, souls, bodies, lives, liberty, and common country, unreservedly and without complaint." Morgan, History of the Wheel and Alliance (Fort Scott, Kan. 1889), p. 56. Compare Slaughter-House Cases, 16 Wall. 36 (1873), Dissenting opinions of Justices Field and Bradley, pp. 83, 101-110, 111, 119-121.

[40] See Apex Hosiery Co. v. Leader, 310 U. S. 469, 491-493, 497-498; Standard Oil Company v. United States, 221 U. S. 1, 58; United States v. Freight Association, 166 U. S. 290, 322-326. See also Paramount Famous Lasky Corporation v. United States, 282 U. S. 30, 42-43.

Nor was the opposition to trusts limited to the monopolization of "goods and services." At the instance of Senator Ingalls of Kansas an amendment was added to the Sherman bill designed to tax out of existence the business of dealing in futures contracts. 21 Cong. Rec. 2613. The Ingalls amendment was adopted by the Senate without a record vote. *Id.* Subsequently the Sherman bill, as amended, was redrafted by the Senate Judiciary Committee which used substantially the same broad and sweeping language which Sections 1 and 2 of the Act contain today. With that language the Sherman bill had the support of Senator Ingalls and other proponents of the Ingalls amendment. 21 Cong. Rec. 3145, 3153. And see United States v. Patten, 226 U. S. 525; Peto v. Howell, 101 F. 2d 353; cf. Chicago Board of Trade v. Olsen, 262 U. S. 1; Stafford v. Wallace, 258 U. S. 495.

See, generally, Ashby, The Riddle of the Sphinx (Des Moines 1890); Morgan, History of the Wheel and Alliance (Fort Scott, Kan. 1889); Buck, The Granger Movement (Camb. 1913); Cloud, Monopolies and the People (Davenport, Iowa 1873); Weaver, A Call to Action (Des Moines 1892); Hicks, The Populist Revolt (Minneapolis 1931).

[41] Representative of anti-trust platforms, resolutions, etc., of contemporary agrarian-political movements are the following: "We demand . . . the passage of a law prohibiting the formation of trusts and combinations by speculators to secure control of the necessaries of life for the purpose of forcing up prices on consumers, imposing heavy penalties." [Texas Farmers' State Alliance, Report of Committee on Industrial Depression, (1888)]; "The objects of the National Alliance are . . . to oppose all forms of monopoly as being detrimental to the best interests of the public" [National Farmers' Alliance, Constitution (1887)]; "We hold to the principle that all monopolies are dangerous . . . , tending to enslave a free people . . . " [National Farmers' Alliance and Industrial Union, Constitution (1889)]; "We oppose the tyranny of monopolies." [National Grange, Declaration of Purposes (1874)].

be abolished, but how this purpose could best be accomplished.[42]

Combinations of insurance companies were not exempt from public hostility against the trusts. Between 1885 and 1912 twenty-three states enacted laws forbidding insurance combinations.[43] When, in 1911, one of these state statutes was unsuccessfully challenged in this Court, the Court had this to say: "We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly." *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307, 316.[44]

Appellees argue that the Congress knew, as doubtless some of its members did, that this Court had prior to 1890 said that insurance was not commerce and was subject to state regulation, and

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[42] The platforms of both the Republican and the Democratic parties in 1888 stated unqualified opposition to monopolies and trusts. Brandon, Platforms of the Two Great Political Parties 1856-1928. The recorded vote in the House on the final conference report on the Sherman Act shows 242 ayes, no nays, and 85 not voting. 21 Cong. Rec. 6314.

[43] Four of these statutes were enacted before 1890. L. N. H. 1885, ch. 93, p. 289; L. Ohio 1885, No. 284, p. 231; L. Mich. 1887, No. 285, p. 384; L. Kan. 1889, ch. 257, p. 389, and L. Kan. 1897, ch. 265, p. 491; L. Ga. 1890-91, No. 745, p. 206; L. Maine 1893, ch. 285, p. 339; L. Mo. 1895, p. 237; L. Iowa 1896, ch. 22, p. 31; L. Ala. 1896-97, No. 634, p. 1428; L. Neb. 1897, ch. 79, p. 347; L. Nel. 1897, ch. 81, p. 354; L. Neb. 1913, ch. 154, pp. 393, 419; L. Wis. 1897, ch. 356, p. 908; Acts Va. 1898, ch. 644, p. 683; Acts S. C. 1902, No. 574, p. 1057; L. S. D. 1903, ch. 158, p. 183; G. L. Tex. 1903, ch. 94, p. 119; Ark. Acts 1905, No. 1, p. 1, as amended by Ark. Acts 1907, No. 184, p. 430; P. L. N. C. 1905, ch. 424, p. 429, and P. L. N. C. 1915, ch. 166, p. 243; Acts Tenn. 1905, ch. 479, p. 1019; Miss. Code 1906, § 5002, adopted L. Miss. 1906, ch. 101, p. 78; Gen. L. Ore. 1909, ch. 230, pp. 388, 399; Sess. L. Wash. 1911, ch 49, pp. 161, 195, and Sess. L. Wash. 1915, ch. 97, p. 278; L. Ariz. 1912, ch. 73, p. 354; Acts La. 1912, No. 224, p. 509.

[44] The farm organizations of this period did not rely solely upon prohibitory legislation to protect themselves from combinations of insurance companies. "In 1886, tired of the extortions of the old-line insurance companies, the Territorial Alliance appointed a committee . . . to devise and put in operation a system of mutual insurance . . . , the result of which has been eminently successful." Report of Alonzo Wardall, President of the Alliance Insurance Companies of the Dakotas, printed in Ashby, The Riddle of the Sphinx (Des Moines 1890), p. 363.

that therefore we should read the Act as though it expressly exempted that business. But neither by reports nor by statements of the bill's sponsors or others was any purpose to exempt insurance companies revealed. And we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power.[45] Cf. *Helvering* v. *Griffiths*, 318 U. S. 371; *Parker* v. *Motor Boat Sales*, 314 U. S. 244. We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power. On the contrary, all the acceptable evidence points the other way. That Congress wanted to go to the utmost extent of its Constitutional power in restraining

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[45] We have been pointed to only one reference made to the business of insurance in the Congressional discussions preceding passage of the Sherman Act, and that is a statement of Senator Turpie which flatly challenged the reasoning of this Court in holding that insurance was not commerce, and further predicted that in the future the Commerce Clause would not be given such a limited construction:

"The Senator from Missouri [Mr. Vest] spoke the other day about the difficulty of defining the word 'commerce,' especially as contained in the phrase 'interstate commerce.' I recollect one judicial decision upon this subject very definitely. The Supreme Court has decided that insurance is not commerce, and I suppose by following the circle of negations long enough and excluding all the things not commerce we should come at last to the residuum, which must be commerce or interstate commerce, because it can be nothing else. *A fortiori*, judging from this principle, I should myself have decided that transportation is not commerce nor interstate commerce either.

. . .

"I feel inclined to make the prediction, as one of the things to come in this vast domain, scarcely touched, of cases arising under the Constitution and laws of Congress, that the whole mass of merchantable paper known as negotiable by the law merchant, made at one place, negotiable at another, payable at another, transcending in its negotiation State lines, will be remitted to Congressional action, and with respect to its creation, its formation, its negotiation, with respect to all the rights and liabilities which may arise under it, the people, stunned with the eternal dissonance of conflicting decisions and judgments of forty-eight or fifty tribunals of last resort in the States upon the subject of interstate negotiable paper, will require Congress to act therein, and that, unconstitutional as I now deem it or think it, it will as a matter of necessity be done, and in any such legislation with respect to that paper, the whole bulk of it, the personal and peculiar conditions of litigants will not be inquired about, but simply whether the one party or the other is entitled to relief or liable to recovery against him by reason of being a party to interstate commercial paper, negotiable and payable and suable under the action of Congress which may finally take place upon that subject. . . .

"Nor do I think with the Senator from New York that we are discharged from duty or released from our obligation to legislate upon the subject of trusts because the States have a right to do so." 21 Cong. Rec. 2556-2557.

And see Note 48, *infra*.

trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt.[46] The purpose was to use that power to make of ours, so far as Congress could under our dual system, a competitive business economy.[47] Nor is it sufficient to justify our reading into the Act an exemption for insurance that the Congress of 1890 may have known that states already were regulating the insurance business. The Congress of 1890 also knew that railroads were subject to regulation not only by states but by the federal government itself, but this fact has been held insufficient to bring to the railroad companies the interpretative exemption from the Sherman Act they have sought. *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 314-315, 320-325.

Appellees further argue that, quite apart from what the Sherman Act meant in 1890, the succeeding Congresses have accepted and approved the decisions of this Court that the business of insurance is not commerce. They call attention to the fact that at various times since 1890 Congress has refused to enact legislation providing for federal regulation of the insurance business, and

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[46] Senator George, a member of the Senate Judiciary Committee which redrafted the Sherman Act before its final passage, stated on the floor of the Senate that, "The bill has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress. . . . It is well known that the great evil of these combinations, these conspiracies, as they are called, these monopolies, as they are denominated by the bill, consists in the fact that by combination, by association, there have been gathered together the money and the means of large numbers of persons, and under these combinations, or conspiracies, or trusts, this great aggregated capital is wielded by a single hand and guided by a single brain, or at least by hands and brains acting in complete harmony and co-operation, and that in this way, by this association, by this direction of this immense amount of capital, by one organized will, to a very large extent, these wrongs have been perpetrated upon the American people." 21 Cong. Rec. 3147.

Earlier, Senator Sherman had explained, "I do not wish to single out any particular trust or combination. It is not a particular trust, but the system I aim at." 21 Cong. Rec. 2457. And in the House, Representative Stewart, delivering the last speech preceding the unanimous adoption of the present Act, stated " . . . The provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress over this subject under the Constitution of the United States. . . ." 21 Cong. Rec. 6314.

Compare Kidd *v.* Pearson, 128 U. S. 1 and United States *v.* E. C. Knight Co., 156 U. S. 1, with Addyston Pipe and Steel Co. *v.* United States, 175 U. S. 211, and United States *v.* American Tobacco Co., 221 U. S. 106.

[47] Senator Sherman, explaining his bill to the Senate, stated, "It is to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." 21 Cong. Rec. 2457.

that several resolutions proposing to amend the Constitution specifically to authorize federal regulation of insurance have failed of passage. In addition they emphasize that, although the Sherman Act has been amended several times, no amendments have been adopted which specifically bring insurance within the Act's proscription. The Government, for its part, points to evidence that various members of Congress during the period 1900-1914 considered there were "trusts" in the insurance business, and expressed the view that the insurance business should be subject to the anti-trust laws.[48] It also points out that in the Merchant Marine Act of 1920 Congress specifically exempted certain conduct of marine insurance companies from the "anti-trust" laws.[49]

The most that can be said of all this evidence considered together is that it is inconclusive as to any point here relevant. By no means does it show that the Congress of 1890 specifically intended to exempt insurance companies from the all-inclusive scope of the Sherman Act. Nor can we attach significance to the omission of Congress to include in its amendments to the Act an express statement that the Act covered insurance. From the beginning Congress has used language broad enough to include all businesses, and never has amended the Act to define these businesses with particularity. And the fact that several Congresses since 1890 have failed to enact proposed legislation providing for more or less comprehensive federal regulation of insurance does not even remotely suggest that any Congress has held the view

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[48] For example, the following colloquy occurred in the House during the debate on passage of the Clayton Act:

"Mr. BARTON. We had an illustration recently where a big fire insurance company came into the State where local insurance companies have been doing business, not confined to the border of the State, and cut prices in that immediate locality until we had in three States 40 or 50 local companies put out of business, and then the price was put back where it was profitable to the company. Might not this same condition exist where we started a wholesale house in a State where their territory was confined to the State—might it not be a reduction of prices for putting that institution out of business?

"Mr. WEBB. If the purpose is to wrongfully injure or destroy a competitor, this section will cover such practice; but insurance companies are not reached, as the Supreme Court has held that their contracts or policies are not interstate commerce.

"Mr. BARTON. Is it not right that they should come within the law?

"Mr. WEBB. Yes." 51 Cong. Rec. 9390.

So far as appears, this was the only mention of the insurance cases during the discussions leading to passage of the Clayton Act. And, as in 1890, when the Sherman Act was under consideration, the reference to these cases showed dissatisfaction with them. See note 45, *supra*.

[49] § 29(b), 41 Stat. 988, 1000.

that insurance alone, of all businesses, should be permitted to enter into combinations for the purpose of destroying competition by coercive and intimidatory practices..

Finally it is argued at great length that virtually all the states regulate the insurance business on the theory that competition in the field of insurance is detrimental both to the insurers and the insured, and that if the Sherman Act be held applicable to insurance much of this state regulation will be destroyed. The first part of this argument is buttressed by opinions expressed by various persons that unrestricted competition in insurance results in financial chaos and public injury. Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court. And as was said in answer to a similar argument that the Sherman Act should not be applied to a railroad combination:

"It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. . . .

"But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. . . ." Harlan, J., Affirming decree, *Northern Securities Co.* v. *United States* 193 U. S. 197, 351-352.

The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without

state supervision, to agree upon and fix uniform insurance rates. Cf. *Parker* v. *Brown*, 317 U. S. 341, 350-352. No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices.[50]

Reversed.

Mr. Justice ROBERTS and Mr. Justice REED took no part in the consideration or decision of this case.

[50] Whether reliance on earlier statements of this Court in the Paul v. Virginia line of cases that insurance is not "commerce" could ever be pleaded as a defense to a criminal prosecution under the Sherman Act is a question which has been suggested but one it is not necessary to discuss at this time.

SUPREME COURT OF THE UNITED STATES.

No. 354.—October Term, 1943.

The United States of America, Appellant, *vs.* South-Eastern Underwriters Association, et al.	On Appeal from the District Court of the United States for the Northern District of Georgia.

[June 5, 1944.]

Mr. Chief Justice Stone, dissenting.

This Court has never doubted, and I do not doubt, that transactions across state lines which often attend and are incidental to the formation and performance of an insurance contract, such as the use of facilities for interstate communication and transportation, are acts of interstate commerce subject to regulation by the federal government under the commerce clause. Nor do I doubt that the business of insurance as presently conducted has in many aspects such interstate manifestations and such effects on interstate commerce as may subject it to the appropriate exercise of federal power. See *Polish Insurance Company* v. *Labor Board*, No. 226, decided this day.

But such are not the questions now before us. We are not concerned here with the power of Congress to do what it has not attempted to do, but with the question whether Congress in enacting the Sherman Act has asserted its power over the business of insurance.

The questions which the Government has raised, advisedly it would seem (cf. *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 499), by the indictment in this case, as it has been interpreted by the District Court below, are quite different from the question, discussed in the Court's opinion, whether the incidental use of the facilities of interstate commerce and transportation in the conduct of the fire insurance business renders the business itself "commerce" within the meaning of the Sherman Act and the commerce clause. The questions here are whether the business of entering into contracts in one state, insuring against the risk of loss by fire of property in others, is itself

interstate commerce; and whether an agreement or conspiracy to fix the premium rates of such contracts and in other ways to restrict competition in effecting policies of fire insurance, violates the Sherman Act. The court below has answered "no" to both of these questions. I think that its answer is right and its judgment should be affirmed, both on principle and in view of the permanency which should be given to the construction of the commerce clause and the Sherman Act in this respect, which has until now been consistently adhered to by all branches of the Government.

The case comes here on direct appeal by the Government from the District Court's judgment dismissing the indictment. Under the provisions of the Criminal Appeals Act, 18 U. S. C. § 682, the only questions open for decision here are whether the District Court's constructions of the commerce clause and of the Sherman Act, on which it rested its decision, are the correct ones. *United States* v. *Borden Co.*, 308 U. S. 188, 193; *United States* v. *Wayne Pump Co.*, 317 U. S. 200, 208; *United States* v. *Swift & Co.*, 318 U. S. 442, 444.

For the particular facts to which the court below applied the Constitution and the Sherman Act we must look to the indictment as the District Court has construed it. And we must accept that construction, for by the provisions of the Criminal Appeals Act the District Court's construction of the indictment is reviewable on appeal not by this Court but by the Circuit Court of Appeals. *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Colgate & Co.*, 250 U. S. 300, 306; *United States* v. *Borden Co.*, *supra*.

The District Court pointed out that the offenses charged by the indictment are a conspiracy to fix arbitrary and non-competitive premium rates on fire insurance sold in several named states, and by means of that conspiracy to restrain and to monopolize trade and commerce in fire insurance in those states. The court went on to say:

"To constitute a violation of the Sherman Act, the restraint and monopoly denounced must be that of interstate trade or commerce, and unless the restraint and monopoly charged in the indictment be restraint or monopoly in interstate trade or commerce, the indictment must fall.

"It is not a question here of whether the defendants participated in some incidental way in interstate commerce or used in some instances the facilities of interstate commerce but is rather whether the activities complained of as constituting the business of insur-

ance would themselves constitute interstate trade or commerce, and whether defendants' method of conducting same amounted to restraint or monopoly of same. It is not a question as to whether or not Congress had power to regulate the insurance companies or some phase of their activities, but rather whether Congress did so by the Sherman Act.

"Persons may be engaged in interstate commerce, yet, if the restraint or monopoly complained of is not itself a restraint or monopoly of interstate trade or commerce, they may not be convicted of violation of the Sherman Act. The fact that they may use the mails and instrumentalities of interstate commerce and communication, and be subject to Federal regulations relating thereto, would not make applicable the Sherman Act to interstate commerce or to activities which were not commerce at all.

"The whole case, therefore, depends upon the question as to whether or not the business of insurance is interstate trade or commerce, and if so, whether the transactions alleged in the indictment constitute interstate commerce."

In short the District Court construed the indictment as charging restraints not in the incidental use of the mails or other instrumentalities of interstate commerce, nor in the insurance of goods moving in interstate commerce, but in the "business of insurance". And by the "business of insurance" it necessarily meant the business of writing contracts of insurance, for the indictment charges only restraints in entering into such contracts, not in their performance,[1] and the Court deemed it irrelevant that in the negotiation and performance of the contracts appellees "may use the mails and instrumentalities of interstate commerce". It held that that business is not in itself interstate commerce, and that the alleged conspiracies to restrain and to monopolize that business were not, without more, in restraint of interstate commerce and consequently were not violations of the Sherman Act.

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[1] It charges an agreement (a) to fix premium rates, (b) to fix commissions paid, (c) to adopt reclassifications of risks on the basis of which premium rates are fixed, (d) to adhere to standard terms, conditions, and clauses, in the insurance contract, (e) to withhold reinsurance facilities from non-members of the South-Eastern Underwriters' Association, (f) to withdraw from and refuse to enter agencies representing non-members, (g) to boycott and withhold patronage from purchasers of insurance from non-members, (h) to disparage the services and facilities of non-members, (i) to establish and maintain rating bureaus to police and maintain these agreements, (j) to establish and maintain boards and groups of agents for the same purpose. There is no allegation that commissions are paid otherwise than on the entering into of the contracts. The indictment thus charges only restraints in the terms of the insurance contracts and restraints, by boycotts, in competition in entering into such contracts and in entering into contracts of reinsurance.

This construction of the indictment as confined in its scope to a conspiracy to fix premium rates and otherwise restrain competition in the business of writing insurance contracts, and to monopolize that business—a construction requiring decision of the question whether that business is interstate commerce—is adopted by the Government. Its brief in this Court states the "questions presented" as follows:

"1. Whether the fire insurance business is in commerce.

"2. Whether the fire insurance business is subject to the constitutional power of Congress to regulate commerce among the several states.

"3. Whether, if so, the Sherman Act is violated by an agreement among fire insurance companies to fix and maintain arbitrary and non-competitive rates and to monopolize trade and commerce in fire insurance, in part through boycotts directed at companies not part of the conspiracy and the agents and purchasers of insurance who deal with them."

The numerous and unvarying decisions of this Court that "insurance is not commerce"[2] have never denied that acts of interstate commerce may be incidental to the business of writing and performing contracts of insurance, or that those incidental acts are subject to the commerce power. Our decisions on this subject have uniformly rested on the ground that the formation of an insurance contract, even though it insures against risk of loss to property located in other states or moving in interstate commerce, is not interstate commerce, and that although the incidents of interstate communication and transportation which often attend the formation and performance of an insurance contract are interstate commerce, they do not serve to render the business of insurance itself interstate commerce. See *Hooper* v. *California*, 155 U. S. 648, 655; *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, 508-9.

If an insurance company in New York executes and delivers, either in that state or another, a policy insuring the owner of a

[2] E. g., Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410; Liverpool Insurance Co. v. Massachusetts, 10 Wall. 566; Philadelphia Fire Association v. New York, 119 U. S. 110; Hooper v. California, 155 U. S. 648; Noble v. Mitchell, 164 U. S. 367; Orient Insurance Co. v. Daggs, 172 U. S. 557; New York Life Insurance Co. v. Cravens, 178 U. S. 389; Nutting v. Massachusetts, 183 U. S. 553; New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495; Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132; National Insurance Co. v. Wanberg, 260 U. S. 71; Bothwell v. Buckbee, Mears Co., 275 U. S. 274. See also Doyle v. Continental Ins. Co., 94 U. S. 535, overruled on other grounds by Terral v. Burke Const. Co., 257 U. S. 529.

building in New Jersey against loss by fire, no act of interstate commerce has occurred. True, if the owner comes to New York to procure the insurance or after delivery in New York carries the policy to New Jersey, or the company sends it there by mail or messenger, such would be acts of interstate commerce. Similarly if the owner pays the premiums by mail to the company in New York, or the company's New Jersey agent sends the premiums to New York, or the company in New York sends money to New Jersey on the occurrence of the loss insured against, acts of interstate commerce would occur. But the power of the Congress to regulate them is derived, not from its authority to regulate the business of insurance, but from its power to regulate interstate communication and transportation. And such incidental use of the facilities of interstate commerce does not render the insurance business itself interstate commerce. Nor is the nature of a single insurance transaction or a few such transactions not involving interstate commerce altered in that regard merely because their number is multiplied. The power of Congress to regulate interstate communication and transportation incidental to the insurance business is not any more or any less because the number of insurance transactions is great or small. The Congressional power to regulate does not extend to the formation and performance of insurance contracts save only as the latter may affect communication and transportation which are interstate commerce or may otherwise be found by Congress to affect transactions of interstate commerce. And even then, such effects on the commerce as do not involve restraints in competition in the marketing of goods and services are not within the reach of the Sherman Act. That such are the controlling principles has been fully recognized by this Court in the numerous cases which have held that the business of insurance is not commerce or as such subject to the commerce power. See, for example, *New York Life Ins. Co.* v. *Deer Lodge County, supra*, 508-9.

These principles are not peculiar to insurance contracts. They are equally applicable to other types of contracts which relate to things or events in other states than that of their execution, but which do not contain any obligation to engage in any form of interstate commerce. The parties to them are not engaged in interstate commerce, for such commerce is not necessarily involved in or prerequisite to the formation of such contracts and

they do not in their performance necessarily involve the doing of interstate business. The mere formation of a contract to sell and deliver cotton or coal or crude rubber is not in itself an interstate transaction and does not involve any act of interstate commerce because cotton, coal and crude rubber are subjects of interstate or foreign commerce, or because in fact performance of the contract may not be effected without some precedent or subsequent movement interstate of the commodities sold, or because there may be incidental use of the facilities of interstate commerce or transportation in the formation of the contract. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 411-13; *Western Live Stock Co.* v. *Bureau of Internal Revenue*, 303 U. S. 250, 253. Compare *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 292. That the principle underlying that conclusion is the same as that underlying the decisions of this Court that the business of insurance is not interstate commerce, has been repeatedly recognized and affirmed. *Paul* v. *Virginia*, 8 Wall. 168, 183; *Hooper* v. *California*, 155 U. S. 648, 654; *Ware & Leland* v. *Mobile County, supra*, 411; *Engel* v. *O'Malley*, 219 U. S. 128, 139; *New York Life Ins. Co.* v. *Deer Lodge County, supra*, 511-12; *Blumenstock Bros.* v. *Curtis Pub. Co.*, 252 U. S. 436, 443; *Hill* v. *Wallace*, 259 U. S. 44, 69; *Chicago Board of Trade* v. *Olson*, 262 U. S. 1, 32-3; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 604; *Western Livestock Co.* v. *Bureau of Internal Revenue, supra*; and see *Hopkins* v. *United States*, 171 U. S. 578, 588-9, 602.

The conclusion that the business of writing insurance is not interstate commerce could not rightly be otherwise unless we were to depart from the universally accepted view that the act of making any contract which does not stipulate for the performance of an act or transaction of interstate commerce is not in itself interstate commerce. And this has been held to be true even though the contract be effected by exchange of communications across state lines, see *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 400; *Ware & Leland* v. *Mobile County, supra*; *New York Life Ins. Co.* v. *Deer Lodge County, supra* 509, a point which need not be considered here for the indictment makes no charge that the policies written by appellees are thus effected, but alleges only that they are "sold" by the defendants in certain named states.

Undoubtedly contracts so entered into for the sale of commodities which move in interstate commerce may become the imple-

ments for restraints in marketing those commodities, and when so used may for that reason be within the Sherman Act, see *Northern Securities Co.* v. *United States*, 193 U. S. 197, 334, 338; *United States* v. *Patten, supra*, 543-4; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 168-9. Compare *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19. But it is quite another matter to say that the contracts are themselves interstate commerce or that restraints in competition as to their terms or conditions are within the Sherman Act, in the absence of a showing that the purpose or effect is to restrain competition in the marketing of the goods or services to which the contracts relate. Compare *Hill* v. *Wallace, supra*, 69, with *Chicago Board of Trade* v. *Olsen, supra*, 31-3; *Blumenstock Bros.* v. *Curtis Pub. Co., supra*, with *Farmers' Guide Co.* v. *Prairie Co.*, 293 U. S. 268; *Moore* v. *New York Cotton Exchange, supra*, with *United States* v. *Patten, supra*.

In this respect insurance contracts do not in point of law stand on any different footing as regards the Sherman Act. If contracts of insurance are in fact made the instruments of restraint in the marketing of goods and services in or affecting interstate commerce, they are not beyond the reach of the Sherman Act more than contracts for the sale of commodities,—contracts which, not in themselves interstate commerce, may nevertheless be used as the means of its restraint. But since trade in articles of commerce is not the subject matter of contracts of insurance, it is evident that not only is the writing of insurance policies not interstate commerce but there is little scope for their use in restraining competition in the marketing of goods and services in or affecting the commerce.

The contract of insurance makes no stipulation for the sale or delivery of commodities in interstate commerce or for any other interstate transaction. It provides only for the payment of a sum of money in the event of the loss insured against and it is no necessary consequence of the alleged restraints on competition in fixing premiums, that interstate commerce will be restrained. We have no occasion to consider the argument which the court below rejected, that the indictment charges that the conspiracy to fix premiums adversely affects interstate commerce because in some instances the commodities insured move across state lines, or because interstate communication and transportation are in some

instances incidental to the business of issuing insurance contracts. This is so both because, as we have said, we are bound by the District Court's construction of the indictment, and, more importantly, because such effects on interstate commerce, as will presently appear, are not within the reach of the Sherman Act.

The conclusion seems inescapable that the formation of insurance contracts, like many others, and the business of so doing, is not, without more, commerce within the protection of the commerce clause of the Constitution and thereby, in large measure, excluded from state control and regulation. See *Hooper* v. *California*, *supra*, 655; *New York Life Insurance Co.* v. *Deer Lodge County*, *supra*. This conclusion seems, upon analysis, not only correct on principle and in complete harmony with the uniform rulings by which this Court has held that the formation of all types of contract which do not stipulate for the performance of acts of interstate commerce, are likewise not interstate commerce, but it has the support of an unbroken line of decisions of this Court beginning with *Paul* v. *Virginia*, seventy-five years ago, and extending down to the present time. In 1913 this Court was asked, on elaborate briefs and arguments, such as are now addressed to us, to overrule *Paul* v. *Virginia*, *supra*, and the many cases which have followed it. *New York Life Insurance Co.* v. *Deer Lodge County*, *supra*. See also *New York Life Insurance Co.* v. *Cravens*, *supra*. In the *Deer Lodge* case the mode of conducting the insurance business was almost identical with that alleged here (231 U. S. at 499-500); it was strenuously urged, as here, that by reason of the great size of insurance companies "modern life insurance had taken on essentially a national and international character" (231 U. S. at 507); and, as here, that the use of the mails incident to the formation of the contract and the interstate transmission of premiums and the proceeds of the policies "constitute 'a current of commerce among the states'" (231 U. S. at 509). All these arguments were rejected, and the business of insurance was held not to be interstate commerce, on the grounds which we have stated and think valid—but which the Government's brief and the opinion of the Court in this case have failed to notice.

If the business of entering into insurance contracts is not interstate commerce, it seems plain that agreements to fix premium rates, or other restraints on competition in entering into such con-

tracts, are not violations of the Sherman Act. As we have often had occasion to point out, the restraints prohibited by the Sherman Act are of competition in the marketing of goods or services whenever the competition occurs in or affects interstate commerce in those goods or services. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495-501, and cases cited. The contract of insurance does not undertake to supply or market goods or services and there is no suggestion that policies of insurance when issued are articles of commerce or that after their issue they are sold in the market as such, or, if they were, that the formation of the contract would itself be interstate commerce. See *Hooper* v. *California*, *supra*; *New York Life Ins. Co.* v. *Deer Lodge County*, *supra*, 510; cf. *Ware & Leland* v. *Mobile County*, *supra*; *Moore* v. *New York Cotton Exchange*, *supra*.

No more does the performance of an insurance contract involving the payment of premiums by the insured and the payment of losses by the insurer involve the marketing of goods or services. The indictment here, as the District Court pointed out, charges restraints on competition in fixing the terms and conditions of insurance contracts. And even if we assume, although the District Court did not mention it, that the indictment also charges restraints on the performance of such contracts, it is plain that such restraints on the performance as well as the formation of the contracts cannot operate as restraints on competition in the marketing of goods or services. Such restraints are not within the purview of the Sherman Act. Compare *Federal Club* v. *National League*, 259 U. S. 200, 209; *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 410-411; *Blumenstock Bros.* v. *Curtis Pub. Co.*, *supra*; *Moore* v. *New York Cotton Exchange*, *supra*. The practice of law is not commerce, nor, at least outside the District of Columbia, is it subject to the Sherman Act, and it does not become so because a law firm attracts clients from without the state or sends its members or juniors to other states to argue cases, or because its clients use the interstate mails to pay their fees. *Federal Club* v. *National League*, *supra*.

It would be strange, indeed, if Congress, in adopting the Sherman Act in 1890, more than twenty years after this Court had supposedly settled the question, had considered that the business of insurance was interstate commerce or had contemplated that the Sherman Act was to apply to it. Nothing in its legislative

history suggests that it was intended to apply to the business of insurance.[3] The legislative materials indicate that Congress was primarily concerned with restraints of competition in the marketing of goods sold in interstate commerce, which were clearly within the federal commerce power.[4] And while the Act is not limited to restraints of commerce in physical goods, see, *e. g.*, *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, there is no reason to suppose that Congress intended the Act to apply to matters in which, under prevailing decisions of this Court, commerce was not involved. On the contrary the House committee, in reporting the bill which was adopted without change, declared: "No attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds. No system of laws can be devised by Congress alone which would effectually protect the people of the United States against the evils and oppression of trusts and monopolies. Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations."[5]

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[3] The decisions of this Court that the negotiation of a contract between citizens of different states is not interstate commerce were known to and accepted by Congress. In the course of the debates in the Senate on the original bill introduced by Senator Sherman, Senator Turpie, discussing the extent of the federal commerce power, stated, "I recollect one judicial decision upon this subject very definitely. The Supreme Court has decided that insurance is not commerce. . . ." 21 Cong. Rec. 2556. During subsequent debates on that bill Senator Hoar, who later took charge of the revised bill reported by the Judiciary Committee and ultimately enacted, 21 Cong. Rec. 3145 *et seq.*, denied the existence of federal substantive power, under the commerce clause or article III, § 2, over contracts between citizens of different states, asserting that Senator Sherman's bill could be supported only as a regulation of the "importation, transportation, or sale of articles. . . ." 21 Cong. Rec. 2567. See also the statements of Senator Eustis at 21 Cong. Rec. 2646, 2651-2.

[4] See Senator Sherman's original bill, S. 3445, 50th Cong., S. 1, 51st Cong., and his statement at 21 Cong. Rec. 2562. Texts of the bill throughout its various amendments are set out in Bills and Debates Relating to Trusts, Sen. Doc. No. 147, 57th Cong., 2nd Sess. (1903).

[5] H. R. Rep. No. 1707, 51st Cong., 1st Sess., p. 1. See also the statement on the floor of the House by Mr. Culberson, in charge of the bill, "There is no attempt to exercise any doubtful authority on this subject, but the bill is confined strictly and alone to subjects over which, confessedly, there is no question about the legislative power of Congress. . . ." 21 Cong. Rec. 4089. And see the statement of Senator Edmunds, chairman of the Senate Judiciary Committee which reported out the bill in the form in which it passed, that in drafting that bill the committee thought that "we would frame a bill that should be clearly within our constitutional power, that we would make its definition out of terms that were well known to the law already, and

In 1904 and again in 1905 President Roosevelt urged "that the Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance".[6] The American Bar Association, executives of leading insurance companies, and others joined in the request.[7] Numerous bills providing for federal regulation of various aspects of the insurance business were introduced between 1902 and 1906[8] but the judiciary committees of both House and Senate concluded that the regulation of the business of marine, fire and life insurance was beyond Congressional power. Sen. Rep. No. 4406, 59th Cong., 1st Sess.; H. R. Rep. No. 2491, 59th Cong., 1st Sess., 12-25. The House committee stated that "the question as to whether or not insurance is commerce has passed beyond the realm of argument, because the Supreme Court of the United States has said many times for a great number of years that insurance is not commerce." (p. 13.)[9]

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would leave it to the courts in the first instance to say how far they could carry it or its particular definitions as applicable to each particular case as the occasion might arise." 21 Cong. Rec. 3148. Similarly Senator Hoar, a member of that committee who with Senator Edmunds was in charge of the bill, stated "Now we are dealing with an offense against interstate or international commerce, which the State cannot regulate by penal enactment, and we find the United States without any common law. The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States." 21 Cong. Rec. 3152.

[6] Messages of the Presidents 6901, 6986-7. See the Report of the Commissioner of Corporations, 1905, p. 5, urging that Congress "so legislate upon the subject as to afford an opportunity to present to the Supreme Court the question whether insurance as now conducted is interstate commerce, and hence subject to Federal regulation."

See also Sen. Doc. No. 333, 59th Cong., 1st Sess. (1906), for a message of President Roosevelt proposing an insurance code for the District of Columbia and enclosing a report of a convention of State officers called by him to investigate wrongful insurance methods.

[7] See, e. g., 29 American Bar Association Reports 538 (1906); 24 Annals of American Academy of Political and Social Sciences (1904) 69, 78-83; 26 *Id.* (1905) 681; Dryden, An Address on the Regulation of Insurance by Congress (1904); 1 Moody's Magazine (1905-6) 271 *et seq.*; 38 American Law Review (1904) 181.

[8] H. R. 7054, 58th Cong., 2d Sess. (1903); H. R. 13791, 58th Cong., 2d Sess. (1904); H. R. 16274, 58th Cong., 3d Sess. (1904); S. 7277, 58th Cong., 3d Sess. (1905); H. R. 15092, 59th Cong., 1st Sess. (1906); H. Res. No. 417, 59th Cong., 1st Sess. (1906). See footnote 9 *infra*. See also S. 1743, 56th Cong., 1st Sess. (1899).

[9] Compare the debates in the House on the bill, S. 569, to establish a Department of Commerce and Labor. As reported by the House Committee on Interstate and Foreign Commerce § 6 of the bill provided for the creation of a bureau of insurance to "exercise such control as may be provided by law"

And when in 1914, one year after the decision in *New York Life Insurance Co.* v. *Deer Lodge County, supra,* Congress by the Clayton Act, 38 Stat. 730, amended the Sherman Act and defined the term "commerce" as used in that Act, it gave no indication that it questioned or desired this Court to overrule the decision of the *Deer Lodge* case and those preceding it. On the contrary Mr. Webb, who was in charge of the bill in the House of Representatives, stated that "insurance companies are not reached as the Supreme Court has held that their contracts or policies are not interstate commerce". 51 Cong. Rec. 9390.[10]

This Court, throughout the seventy-five years since the decision of *Paul* v. *Virginia,* has adhered to the view that the business of

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over insurance companies and to "foster, promote, and develop" the insurance business by collecting and compiling statistics. H. R. Rep. No. 2970, 57th Cong., 2d Sess., 12, 15. After extended debate, in which the provision was objected to for want of power in the federal government to regulate the insurance business and as a threat to the continuance of existing state regulation, 36 Cong. Rec. 868-9, 872-3, 908-11, 919-21, and in which it was insisted by proponents of the bill, as now, that insurance is commerce, 36 Cong. Rec. 876-7, amendments to strike all reference to insurance from the bill were adopted. 36 Cong. Rec. 911, 921. A proposed amendment to prohibit the use of the mails by insurance companies doing business in violation of state law was likewise defeated. 36 Cong. Rec. 922-3. The conference committee then inserted the provision, adopted as § 6 of the Act, 32 Stat. 828, authorizing the Bureau of Corporations to compile and publish useful information concerning corporations doing business in the United States and engaged in interstate or foreign commerce, "including corporations engaged in insurance". Upon assurances that this section "simply authorizes information being secured" and that "there is nothing in this measure that contravenes the votes of the House on that subject", 36 Cong. Rec. 2008, the conference report was adopted. The insurance provisions were not in the bill as it had originally passed the Senate, and the conference report was adopted by that body without debate. 36 Cong. Rec. 1990, 2035-6.

The Commissioner of Corporations made a study of state legislation, but reported that "in view of the decisions of the Supreme Court I have not felt warranted in trying to assume jurisdiction over insurance companies for the purpose of investigation." Report of the Commissioner of Corporations, 1905, p. 5; see Report of the Commissioner of Corporations, 1904, pp. 29-33; Report of the Secretary of Commerce and Labor, 1903, p. 28.

[10] Mr. Webb's statement was made in answer to an inquiry by Mr. Barton as to whether the proposed section 2 of the Clayton Act would render illegal certain practices if engaged in by wholesalers, in the course of which Mr. Barton referred to an instance of such practices committed by insurance companies. The colloquy continued:

"Mr. BARTON. It is not right that they should come within the law?

Mr. WEBB. Yes."

Assuming that Mr. Webb's answer related to insurance companies, and expressed a desire that such companies should be included within the prohibitions of the Sherman and Clayton Acts, but were not, nothing was done to amend those Acts so as to carry out that desire or which would require this Court to reexamine the scope of federal power over insurance.

insurance is not interstate commerce.[11] Such has ever since been the practical construction by the other branches of the Government of the application to insurance of the commerce clause and the Sherman Act. Long continued practical construction of the Constitution or a statute is of persuasive force in determining its meaning and proper application. *Pocket Veto Case,* 279 U. S. 655, 688-90; *Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, 351-2; *United States* v. *Cooper Corp.,* 312 U. S. 600, 613-4. It is significant that in the fifty years since the enactment of the Sherman Act the Government has not until now sought to apply it to the business of insurance,[12] and that Congress has continued to regard insurance as not constituting interstate commerce. Although often asked to do so it has repeatedly declined to pass legislation regulating the insurance business and to sponsor constitutional amendments subjecting it to Congressional control.[13]

The decision now rendered repudiates this long continued and consistent construction of the commerce clause and the Sherman Act. We do not say that that is in itself a sufficient ground for declining to join in the Court's decision. This Court has never committed itself to any rule or policy that it will not "bow to the lessons of experience and the force of better reasoning" by overruling a mistaken precedent. See cases collected in Justice Brandeis's dissenting opinion in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406-9, notes 1-4, and in *Smith* v. *Allwright,*

[11] For cases arising under the Anti-Trust laws in which this Court has so stated see Hopkins v. United States, 171 U. S. 578, 602; Blumenstock Bros. v. Curtis Publishing Co., 252 U. S. 436, 443; Federal Club v. National League, 259 U. S. 200, 209; Standard Oil Co. v. United States, 283 U. S. 163, 168-9; and see Northern Securities Co. v. United States, 193 U. S. 197, 372, 377 (dissenting opinion). See also United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 410; United Leather Workers v. Herkert & Co., 265 U. S. 457, 470-71, relying on Ware and Leland v. Mobile County, 209 U. S. 405, a case applying the insurance rule to cotton futures contracts not calling for interstate shipment or delivery.

[12] One private suit was brought in the District of Columbia to enjoin rate-fixing by an underwriters' association; the suit was dismissed on the ground that insurance was not commerce. Lown v. Underwriters' Ass'n, Sup. Ct. D. C. June 23, 1915, reported in 6 Federal Anti-Trust Decisions 1048.

Over 252 criminal prosecutions and 272 suits at equity have been instituted by the United States under the Sherman Act, Hamilton, Antitrust in Action, Monograph No. 16, prepared for the Temporary National Economic Committee (1940) 76, 78, and over 103 private actions have been brought, Note, 49 Yale L. J. 284, 296 (1939).

[13] In addition to the bills at note 7, *supra,* see H. J. Res. 31, 60th Cong., 1st Sess. (1907); S. J. Res. 103, 63rd Cong., 2d Sess. (1914); H. J. Res. 194, 63rd Cong., 2d Sess. (1914); S. J. Res. 58, 64th Cong., 1st Sess. (1915); S. J. Res. 51, 73rd Cong., 1st Sess. (1933), all proposing constitutional amendments.

(; and see Legal Tender Cases
12 Wall. 457, 553-54.

No. 51, decided April 3, 1944, note 10. This is especially the case when the meaning of the Constitution is at issue and a mistaken construction is one which cannot be corrected by legislative action.

To give blind adherence to a rule or policy that no decision of this Court is to be overruled would be itself to overrule many decisions of the Court which do not accept that view. But the rule of stare decisis embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right. This is especially so where as here, Congress is not without regulatory power. Cf. *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261, 271, 275. The question then is not whether an earlier decision should ever be overruled, but whether a particular decision ought to be. And before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity. Compare *Helvering* v. *Griffiths*, 318 U. S. 371, 400-4.

From what has been said it seems plain that our decisions that the business of insurance is not commerce are not unsound in principle, and involve no inconsistency or lack of harmony with accepted doctrine. They place no field of activity beyond the control of both the national and state governments as did *Hammer* v. *Dagenhart*, 247 U. S. 251, overruled three years ago by a unanimous Court in *United States* v. *Darby*, 312 U. S. 100, 117. On the contrary the ruling that insurance is not commerce, and is therefore unaffected by the restrictions which the commerce clause imposes on state legislation, removed the most serious obstacle to regulation of that business by the states. Through their plenary power over domestic and foreign corporations which are not engaged in interstate commerce, the states have developed extensive and effective systems of regulation of the insurance business, often solving regulatory problems of a local character with which it would be impractical or difficult for Congress to deal through the exercise of the commerce power. And in view of the broad powers of the federal government to regulate matters which, though not themselves commerce, nevertheless affect interstate commerce, *Wickard* v. *Filburn*, 317 U. S. 111; *Polish Insurance Co.* v. *Labor Board*, *supra*, there can be no doubt of the power of Congress if it so desires to regulate many aspects of the insurance business mentioned in this indictment.

But the immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance. Congress having taken no action, the present decision substitutes, for the varied and detailed state regulation developed over a period of years, the limited aim and indefinite command of the Sherman Act for the suppression of restraints on competition in the marketing of goods and services in or affecting interstate commerce, to be applied by the courts to the insurance business as best they may.

In the years since this Court's pronouncement that insurance is not commerce came to be regarded as settled constitutional doctrine, vast efforts have gone into the development of schemes of state regulation and into the organization of the insurance business in conformity to such regulatory requirements. Vast amounts of capital have been invested in the business in reliance on the permanence of the existing system of state regulation. How far that system is now supplanted is not, and in the nature of things could not well be, explained in the Court's opinion. The Government admits that statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act, and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act. The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail in the briefs and argument or in the Court's opinion.

Certainly there cannot but be serious doubt as to the validity of state taxes which may now be thought to discriminate against the interstate commerce, cf. *Philadelphia Fire Association* v. *New York*, 119 U. S. 110; or the extent to which conditions may be imposed on the right of insurance companies to do business within a state; or in general the extent to which the state may regulate whatever aspects of the business are now for the first time to be regarded as interstate commerce. While this Court no longer adheres to the inflexible rule that a state cannot in some measure regulate interstate commerce, the application of the test presently applied requires "a consideration of all the relevant facts and circumstances" in order to determine whether the matter is an appropriate one for local regulation and whether the regulation does not unduly burden interstate commerce, *Parker* v. *Brown*,

317 U. S. 341, 362—a determination which can only be made upon a case-to-case basis. Only time and costly experience can give the answers.

Congress made the choice against so drastic a change when in 1906 it rejected the proposals to assume national control over the insurance business. The report of the House Committee on the Judiciary pointed out that "all of the evils and wrongs complained of are subject to the exclusive regulation of State legislative power" and added: "assuming that Congress declares that insurance is commerce and the Supreme Court holds the legislation constitutional, how much could Congress regulate, and what effect would such legislation have? It would disturb the very substructure of government by precipitating a violent conflict between the police power of the States and the power of Congress to regulate interstate commerce. To uphold the Federal power would be to extinguish the police power of the State by the legislation of Congress. In other words, Congress would admit corporations into the respective States and have the entire regulating power." H. R. Rep. No. 2491, 59th Cong., 1st Sess., 13, 15-16. See *id.* 18.

Had Congress chosen to legislate for such parts of the insurance business as could be found to affect interstate commerce, whether by making the Sherman Act applicable to them or by regulation in some other form, it could have resolved many of these questions of conflict between federal and state regulation. But this Court can decide only the questions before it in particular cases. Its action in now overturning the precedents of seventy-five years governing a business of such volume and of such wide ramifications, cannot fail to be the occasion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power, raising questions which cannot be answered for years to come, during which a great business and the regulatory officers of every state must be harassed by all the doubts and difficulties inseparable from a realignment of the distribution of power in our federal system. These considerations might well stay a reversal of long established doctrine which promises so little of advantage and so much of harm. For me these considerations are controlling.

The judgment should be affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 354.—October Term, 1943.

The United States of America, Appellant, *vs.* South-Eastern Underwriters Association, et al.	Appeal from the District Court of the United States for the Northern District of Georgia.

[June 5, 1944.]

Mr. Justice Frankfurter.

I join in the opinion of the Chief Justice.

The relations of the insurance business to national commerce and finance, I have no doubt, afford constitutional authority for appropriate regulation by Congress of the business of insurance, certainly not to a less extent than Congressional regulation touching agriculture. See, *e. g.*, *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Wickard* v. *Filburn*, 317 U. S. 111. But the opinion of the Chief Justice leaves me equally without doubt that by the enactment of the Sherman Act in 1890, Congress did not mean to disregard the then accepted conception of the constitutional basis for the regulation of the insurance business. And the evidence is overwhelming that the inapplicability of the Sherman Act, in its contemporaneous setting, to insurance transactions such as those charged by this indictment has been confirmed and not modified by Congressional attitude and action in the intervening fifty years. There is no Congressional warrant therefore for bringing about the far-reaching dislocations which the opinions of the Chief Justice and Mr. Justice Jackson adumbrate.

SUPREME COURT OF THE UNITED STATES.

No. 354.—October Term, 1943.

The United States of America, Appellant, vs. South-Eastern Underwriters Association, et al. | On Appeal from the District Court of the United States for the Northern District of Georgia.

[June 5, 1944.]

Mr. Justice Jackson, dissenting in part.

I.

The historical development of public regulation of insurance underwriting in this country has created a dilemma which confronts this Court today. It demonstrates that "The life of the law has not been logic: it has been experience."

For one hundred fifty years Congress never has undertaken to regulate the business of insurance. Therefore to give the public any protection against abuses to which that business is peculiarly susceptible the states have had to regulate it. Since 1851 the several states, spurred by necessity and with acquiescence of every branch of the Federal Government, have been building up systems of regulation to discharge this duty toward their inhabitants.[1]

There never was doubt of the right of a state to regulate the business of its domestic companies done within the home state. The foreign corporation was the problem. Such insurance interests resisted state regulation and brought a series of cases to this Court. The companies sought to disable the states from regulating them by arguing that insurance business is interstate commerce, an argument almost identical with that now made by the Government.[2] The foreign companies thus sought to vest insurance con-

1 Insurance commissions were established by New Hampshire in 1851, (N. H. Laws 1851, c. 1111); by Massachusetts in 1852 (Mass. Laws 1852, c. 231); by Rhode Island in 1855 (R. I. Laws, October 1854, p. 17, § 17). By 1890, when the Sherman Act became law, seventeen states had established supervisory authorities. Patterson, The Insurance Commissioner in the United States (1927) p. 536, n. 62.

2 See particularly argument of New York Life Insurance Company in New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 496 (1913), and that for Paul in Paul v. Virginia, 8 Wall. 168 (1868).

trol exclusively in Congress and to deprive every state of power to exclude them, to regulate them, or to tax them for the privilege of doing business.

The practical and ultimate choice that faced this Court was to say either that insurance was subject to state regulation or that it was subject to no existing regulation at all. The Court consistently sustained the right of the states to represent the public interest in this enterprise. It did so, wisely or unwisely, by resort to the doctrine that insurance is not commerce and hence is unaffected by the grant of power to Congress to regulate commerce among the several states. Each state thus was left free to exclude foreign insurance companies altogether or to admit them to do business on such conditions as it saw fit to impose. The whole structure of insurance regulation and taxation as it exists today has been built upon this assumption.[3]

The doctrine that insurance business is not commerce always has been criticized as unrealistic, illogical, and inconsistent with other holdings of the Court. I am unable to make any satisfactory distinction between insurance business as now conducted and other transactions that are held to constitute interstate commerce.[4] Were we considering the question for the first time and writing upon a clean slate, I would have no misgivings about holding that insurance business is commerce and where conducted across state lines is interstate commerce and therefore that congressional power to regulate prevails over that of the states. I have little doubt that if the present trend continues federal regulation eventually will supersede that of the states.

The question therefore for me settles down to this: What role ought the judiciary to play in reversing the trend of history and setting the nation's feet on a new path of policy? To answer this I would consider what choices we have in the matter.

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[3] Paul *v.* Virginia, 8 Wall. 168, 183 (1868); Hooper *v.* California, 155 U. S. 648, 655 (1895); Noble *v.* Mitchell, 164 U. S. 367, 370 (1896); New York Life Insurance Company *v.* Cravens, 178 U. S. 389, 401 (1900); New York Life Insurance Co. *v.* Deer Lodge County, 231 U. S. 495 (1913); Bothwell *v.* Buckbee, Mears Co., 275 U. S. 274; Ducat *v.* Chicago, 10 Wall. 410; Liverpool Insurance Co. *v.* Massachusetts, 10 Wall. 566; Philadelphia Fire Association *v.* New York, 119 U. S. 110; Nutting *v.* Massachusetts, 183 U. S. 553; Northwestern Mutual Life Insurance Co. *v.* Wisconsin, 247 U. S. 132.

[4] E. g., Champion *v.* Ames, 188 U. S. 321 (lottery tickets); Electric Bond & Share Co. *v.* S. E. C., 303 U. S. 419 (holding companies).

II.

The Government claims, and we must approve or reject the claim, that the antitrust laws constitute an exercise of congressional power which reaches the insurance business. That might be true on either of two different bases. The practical as well as the theoretical difference is substantial, as this case will show.

1. If an activity is held to be interstate commerce, Congress has paramount regulatory power. If it acts at all in relation to such a subject, it often has been held that it has "occupied the field" to the exclusion of the states, that the federal legislation defines the full measure of regulation and outside of it the activity is to be free.[5] This Court now is not fully agreed as to the effects of the Commerce Clause on state power,[6] but at least the Court always has considered that if an activity is held to be interstate in character a state may not exclude, burden, or obstruct it,[7] nor impose a license tax on the privilege of carrying it on within the state.[8] The holding of the Court in this case brings insurance within this line of decisions restricting state power.

2. Although an activity is held not to be commerce or not to be interstate in character, Congress nevertheless may reach it to prohibit specific activities in its conduct that substantially burden or restrain interstate commerce. *Wickard* v. *Filburn*, 317 U. S. 111. When this power is exercised by Congress, it impairs state regulation only in so far as it actually conflicts with the federal regulation. *Terminal Railroad Association* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1. This congressional power to reach activities that are not interstate commerce interferes with state power only in a milder, narrower, and more specific way.

Instead of overruling our repeated decisions that insurance is not commerce, the Court could apply to this case the principle that even if it is not commerce the antitrust laws prohibit its manipulation to restrain interstate commerce, just as we hold that the National Labor Relations Act prohibits insurance companies, even if not in commerce, from engaging in unfair labor

[5] E. g., Pennsylvania R. R. Co. v. Public Service Comm., 250 U. S. 566.

[6] McCarroll v. Dixie Greyhound Lines, Inc., 309 U. S. 176; Duckworth v. Arkansas, 314 U. S. 390.

[7] Furst v. Brewster, 282 U. S. 493, and cases cited.

[8] Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203; Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

practices which affect commerce. *Polish Alliance* v. *N. L. R. B.*, decided today. This would require the Government to show that any acts it sought to punish affect something more than insurance and substantially affect interstate transportation or interstate commerce in some commodity. Whatever problems of reconciliation between state and federal authority this would present—and it would not avoid them all—it would leave the basis of state regulation unimpaired.

The principles of decision that I would apply to this case are neither novel nor complicated and may be shortly put:

1. As a *matter of fact*, modern insurance business, as usually conducted, is commerce; and where it is conducted across state lines, it is *in fact* interstate commerce.

2. In contemplation of law, however, insurance has acquired an established doctrinal status not based on present-day facts. For constitutional purposes a fiction has been established, and long acted upon by the Court, the states, and the Congress, that insurance is not commerce.

3. So long as Congress acquiesces, this Court should adhere to this carefully considered and frequently reiterated rule which sustains the traditional regulation and taxation of insurance companies by the states.

4. Any enactment by Congress either of partial or of comprehensive regulations of the insurance business would come to us with the most forceful presumption of constitutional validity. The fiction that insurance is not commerce could not be sustained against such a presumption, for resort to the facts would support the presumption in favor of the congressional action. The fiction therefore must yield to congressional action and continues only at the sufferance of Congress.

5. Congress also may, without exerting its full regulatory powers over the subject, and without challenging the basis or supplanting the details of state regulation, enact prohibitions of any acts in pursuit of the insurance business which substantially affect or unduly burden or restrain interstate commerce.

6. The antitrust laws should be construed to reach the business of insurance and those who are engaged in it only under the latter congressional power. This does not require a change in the doctrine that insurance is not commerce. The statute as thus construed would authorize prosecution of all combinations in the

course of insurance business to commit acts not required or authorized by state law, such as intimidation, disparagement, or coercion, if they unreasonably restrain interstate commerce in commodities or interstate transportation.[9] It would leave state regulation intact.

III.

The majority of the sitting Justices insist that we follow the more drastic course. Abstract logic may support them, but the common sense and wisdom of the situation seem opposed. It may be said that practical consequences are no concern of a court, that it should confine itself to legal theory. Of course, in cases where a constitutional provision or a congressional statute is clear and mandatory, its wisdom is not for us. But the Court now is not following, it is overruling, an unequivocal line of authority reaching over many years. We are not sustaining an act of Congress against attack on its constitutionality, we are making unprecedented use of the Act to strike down the constitutional basis of state regulation. I think we not only are free, but are duty bound, to consider practical consequences of such a revision of constitutional theory. This Court only recently recognized that certain former decisions as to the dividing line between state and federal power were illogical and theoretically wrong, but at the same time it announced that it would adhere to them because both governments had accommodated the structure of their laws to the error. *Davis* v. *Department of Labor*, 317 U. S. 249, 255. It seemed a common-sense course to follow then, and I think similar considerations should restrain us from following a contrary and destructive course now.

The states began nearly a century ago to regulate insurance, and state regulation, while no doubt of uneven quality, today is a successful going concern. Several of the states, where the greatest volume of business is transacted, have rigorous and enlightened legislation, with enforcement and supervision in the hands of experienced and competent officials. Such state departments, through trial and error, have accumulated that body of institutional ex-

[9] The Government contends that at least Count One of the present indictment conforms to this interpretation of the antitrust laws. Under the Criminal Appeals Act we have no jurisdiction to construe or reconstrue the indictment. My view would require remand to the District Court or the Circuit Court of Appeals for consideration in the light of our opinion.

perience and wisdom so indispensable to good administration. The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one now can say, and it will take a generation of litigation to determine. Certainly the states lose very important controls and very considerable revenues.[10]

The recklessness of such a course is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise.[11] There is no federal department or personnel with national experience in the subject on which Congress can call for counsel in framing regulatory legislation. A poorer time to thrust upon Congress the necessity for framing a plan for nationalization of insurance control would be hard to find.

Moreover, we have not a hint from Congress that it concurs in the plan to federalize responsibility for insurance supervision.

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[10] In 1943, gross premiums taxes on insurance companies yielded 40 states in aggregate of $96,108,000 and the remaining eight an estimated $26,892,000, making a total of $123,000,000. State Tax Collections in 1943, pamphlet published by Bureau of the Census, p. 8.

[11] It is impossible to believe that Congress, if it ever intended to assume responsibility for general regulation of insurance, would have made the antitrust laws the sole manifestation of its purpose. Its only command is to refrain from restraints of trade. Intelligent insurance regulation goes much further. It requires careful supervision to ascertain and protect solvency, regulation which may be inconsistent with unbridled rate competition. It prescribes some provisions of policies of insurance and many other matters beyond the scope of the Sherman Act.

Also it requires sanctions for obedience far more effective than the $5,000 maximum fine on corporations prescribed by the antitrust laws. Violation of state laws are commonly punishable by cancellation of permission to do business therein—a drastic sanction that really commands respect.

The antitrust law sanctions are little better than absurd when applied to huge corporations engaged in great enterprise. In the two related *Madison Oil* cases (see United States *v.* Socony-Vacuum Oil Co., 310 U. S. 150) fifteen of the seventeen corporations convicted had combined capital and surplus reported to be $2,833,516,247. The total corporate fines on them were $255,000, making a ratio of fines to corporate capital and surplus of less than 1/100 of one per cent. In addition, fines of $180,000 were assessed against individuals. In the automobile financing case (see United States *v.* General Motors Corp., 121 F. 2d 376, cert. denied, 314 U. S. 618) General Motors Corporation, three wholly owned subsidiaries and no individuals were convicted. The fines were $20,000. Capital and surplus were then reported at $1,047,840,321, the fine being somewhat less than 1/500 of 1 per cent thereof.

In each case the corporate fines were $5000, the maximum permitted by the statute. 15 U. S. C. § 1.

Indeed, every indication is to the contrary.[12] It was urged to do so by one President,[13] and by the insurance companies.[14] The decisions of this Court confirming state power over insurance have been paralleled by a history of congressional refusal to extend federal authority into the field,[15] although no decision ever has explicitly denied the power to do so.

The orderly way to nationalize insurance supervision, if it be desirable, is not by court decision but through legislation. Judicial

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[12] The last agency to investigate insurance problems was the Temporary National Economic Committee. It made no recommendation of federal control. Its chairman, Senator O'Mahoney, after reviewing carefully the problems caused by the concentration of economic power in the hands of the insurance companies and the abuses of the business, said: "Therefore I say again that personally I would not support any law that would undertake to do away with state regulation of insurance, and there never has been suggested to me or to any member of the TNEC or to the committee as a whole any thought of doing away with state regulation or imposing federal supervision." 26 American Bar Association Journal 913. Both dominant political parties have supported the present system. In 1940, the Democratic platform contained this provision: "We favor strict supervision of all forms of the insurance business by the several States for the protection of policyholders and the public." The Republican platform of that year contained this provision: "We favor a continuance of regulation of insurance by the several States."

[13] President Theodore Roosevelt twice recommended that Congress assume control of insurance. Message of December 6, 1904, 39 Cong. Rec. 12, and Message of December 5, 1905, 40 Cong. Rec. 95.

[14] See Insurance Blue Book (Centennial Issue, 1876) Ch. VI, Fire Insurance, p. 32.

[15] In 1866, a bill was introduced in the House, providing for creation of a national bureau of insurance in the Treasury Department. It was not passed. H. R. 738, 39th Cong., 1st Sess.

In 1868, a bill was introduced in the Senate proposing a national bureau of insurance, but never passed. S. 299, 40th Cong., 2d Sess.

In 1892, a bill was introduced in the House creating the office of Commissioner of Insurance. It was never reported out of committee. H. R. 9629, 52d Cong., 1st Sess.

In 1897, a bill was introduced in the Senate to declare that insurance companies doing business outside of the states of their incorporation were to be deemed to be engaged in interstate commerce. It was not reported out of committee. S. 2736, 55th Cong., 2d Sess.

After President Roosevelt's recommendation of 1904, Senator Dryden introduced a bill in the Senate to establish a bureau of insurance in the Department of Commerce. The bill died in committee. S. 7277, 58th Cong., 3d Sess.

After President Roosevelt's second recommendation, the House Judiciary Committee reported that Congress had no power to regulate insurance, and said: "The views of the Supreme Court have practically met the approval of the bar and business men of the United States as being in accordance with law and common sense." H. R. Rep. 2491, 59th Cong., 1st Sess., March 23, 1906, p. 14.

The Senate Committee on the Judiciary made a similar report. Sen. Rep. 4406, 59th Cong., 1st Sess., 1906.

In 1914-15, resolutions were introduced in both the House and the Senate proposing an amendment to the Constitution to the effect that Congress should have power to regulate the business or commerce of insurance through

decision operates on the states and the industry retroactively. We cannot anticipate, and more than likely we could not agree, what consequences upon tax liabilities, refunds, liabilities under state law to states or to individuals, and even criminal liabilities will follow this decision. Such practical considerations years ago deterred the Court from changing its doctrine as to insurance.[16] Congress, on the other hand, if it thinks the time has come to take insurance regulation into the federal system, may formulate and announce the whole scope and effect of its action in advance, fix a future effective date, and avoid all the confusion, surprise, and injustice which will be caused by the action of the Court.[17]

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out the United States and its territories or possessions. The resolutions were not reported out of the Judiciary Committee. S. J. Res. 103, 63d Cong., 2d Sess.; H. J. Res. 194, 63d Cong., 2d Sess.; S. J. Res. 58, 64th Cong., 1st Sess.

In 1933, a resolution was introduced for a similar constitutional amendment which died in committee. S. J. Res. 51, 73d Cong., 1st Sess.

Moreover, by exceptions and exemptions Congress has indicated a clear intent to avoid interference with state supervision. Insurance corporations are excepted from those who may become bankrupts. 11 U. S. C. § 22. Insurance issued by any issuer under state supervision is exempted from the Securities Act. 15 U. S. C. § 77c(a)(8). Insurance companies supervised by state authority are exempted from regulation as investment companies. 15 U. S. C. §§ 80a-2(a)(17) and 80a-3(c)(3).

[16] In New York Life Insurance Company *v.* Deer Lodge County, 231 U. S. 495, 502, the Court said: "To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision."

[17] In resisting pressure to federalize insurance supervision Congress has followed the advice of some of the best informed champions of the public interest on insurance problems. One was Louis D. Brandeis. Speaking as counsel for the Protective Committee of Policy-holders in the Equitable Life Assurance Society, before the Commercial Club of Boston, on October 26, 1905, Mr. Brandeis said:

"The sole effect of a Federal law would be—the sole purpose of the Dryden bill [see note 15, *supra*] must have been—to free the companies from the careful scrutiny of the commissioners of some of the States. It seeks to rob the State even of the right to protect its own citizens from the legalized robbery to which present insurance measures subject the citizens, for by the terms of the bill a Federal license would secure the right to do business within the borders of the State, regardless of the State prohibitions, free from the State's protective regulations. With a frankness which is unusual—and an effrontery which is common—among the insurance magnates—this bill is introduced in the Senate by John F. Dryden, the president of the Prudential Life Insurance Company—the company which pays to stockholders annual dividends equivalent to 219.78 per cent. for each dollar paid in on the stock; the company which devotes itself mainly to insuring the working men at an expense of over 37.28 cents on every dollar of premiums paid; the company which, in 1904, made the worst record of lapsed and surrendered industrial policies. . . .

"Federal supervision is also advocated by Mr. James M. Beck (formerly Assistant Attorney General of the United States), the counsel for the Mutual

A judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical and in part upon policy considerations. When, as in this problem, such practical and political judgments can be made by the political branches of the Government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress.

Moreover, this is the method of responsible democratic government. To force the hand of Congress is no more the proper function of the judiciary than to tie the hands of Congress. To use my office, at a time like this, and with so little justification in necessity, to dislocate the functions and revenues of the states[18] and to catapult Congress into immediate and undivided responsibility for supervision of the nation's insurance businesses is more than I can reconcile with my view of the function of this Court in our society.

Life Insurance Company, and his main argument against State supervision appears to be that the companies pay, in the aggregate, for fees and taxes in the several States $10,000,000, which he says is twice as much as is necessary to cover the expense of proper supervision. Ten million dollars is a large sum in itself, but a very small one compared with the aggregate assets or the aggregate expense of management. Mr. Beck's company paid in 1904 $1,138,663 in taxes and fees. Its management expenses were $15,517,520, or nearly fourteen times as much. Our Massachusetts savings banks paid in the year ending October 31, 1904, $1,627,794.46 in taxes to this Commonwealth: that is $80,890.02 more than the whole expense of management, which was $1,546,904.44.

"Doubtless the insurance departments of some States are subjects for just criticism. In many of the States the department is inefficient, in some doubtless corrupt. But is there anything in our experience of Federal supervision of other departments of business which should lead us to assume that it will be freer from grounds of criticism or on the whole more efficient than the best insurance department of any of the States? For it must be remembered that an efficient supervision by the department of any State will in effect protect all the policy-holders of the company wherever they may reside. Let us remember rather the ineffectiveness for eighteen long years of the Interstate Commerce Commission to deal with railroad abuses, the futile investigation by Commissioner Garfield of the Beef Trust, and the unfinished investigation into the affairs of the Oil Trust in which he has since been engaged. Federal supervision would serve only to centralize still further the power of our Government and to increase still further the powers of the corporations."

Mr. Justice Brandeis for a unanimous Court wrote, in Bothwell v. Buckbee, Mears Co., 275 U. S. 274, 276 (1927): "A contract of insurance, although made with a corporation having its office in a State other than that in which the insured resides and in which the interest insured is located, is not interstate commerce." He joined in other similar decisions in Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132; National Union Fire Insurance Co. v. Wanberg, 260 U. S. 71.

[18] Thirty-five states of the Union have filed *amicus curiae* briefs with us, protesting against the decision which the Court is promulgating.